THE PRINCIPLES

OF THE

HIGH COURT OF CHANCERY,

AND THE

POWERS AND DUTIES OF ITS JUDGES;

DESIGNED AS

The Student's First Book

ON

EQUITY JURISPRUDENCE.

Proprie vero et singulariter Æquitas est virtus voluntatis correctione ejus, in quo lex propter universalitatem deficit.—*Grot. de Æquitate, c.* 1, *s.* 2.

BY

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FROM THE SECOND LONDON EDITION.

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PREFACE

TO THE SECOND EDITION.

A SECOND EDITION of "The Principles of Equity" having been called for, the Author has carefully gone through the former Edition for the purpose of adapting it to the present state of the Law, and is agreeably surprised to find that notwithstanding the many alterations, indeed, the complete changes which have been made in the practice and proceedings of the High Court of Chancery, THE PRINCIPLES by which the decisions of such Court are guided, and for the enunciation and elucidation of which this book was written, have been so little changed, that it has been only necessary to make some minute alterations, and in the concluding chapter to review the various changes and improvements which since the publication of the former Edition have been made in the jurisdiction of the Court and in its practice and procedure, and to that chapter the Student is particularly referred.

4, STONE BUILDINGS,
LINCOLN'S INN,
May, 1857.

PREFACE.

THE Author, in presenting these pages to the Profession, trusts he will not be considered presumptuous in thus attempting to facilitate the Student's entrance into the abstruse studies which are necessary for the full understanding of the extensive department of legal learning of which he has here ventured to treat.

The want, which all persons on commencing the investigation of any subject, invariably experience for some general and concise statement of the leading features and doctrines of the particular branch which they desire to master, has led the Author to hope, that this his endeavour to epitomise the comprehensive subject of Equitable Jurisprudence, will not be unfavourably received; and to the completion of the following pages, he has been the more induced by the favourable reception which Mr. Williams's able introductory Treatises on The Laws of Real and Personal Property have met with from the Profession.

The Author's aim, throughout the following pages, has been, not in the least to supersede any of the learned works which treat of the [*iv] various subjects of *Equity Jurisprudence, but simply to afford the student some slight assistance towards the attainment of the knowledge with which such works are replete. From them he has taken the liberty (without impropriety, he hopes,) of selecting such portions as he considered best suited to lay before the reader, and to them, instead of to the numerous decisions and dicta which support the various propositions which are laid down, has he purposely referred. The principal references have been made to the learned and excellent Commentaries of the late lamented American Judge, from which, conjointly with the numerous valuable treatises of our own countrymen, has the following work been constructed; and to such the student, as he progresses in the knowledge of the different matters treated of, is particularly referred for further and fuller information.

4, STONE BUILDINGS, LINCOLN'S INN,
13*th April*, 1852.

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THE

PRINCIPLES AND JURISDICTION

OF

THE COURT OF CHANCERY.

PART I.

CHAPTER I.

OF THE COURT OF CHANCERY.(a)

THE High Court of Chancery has an original jurisdiction, and is one of the Superior Courts of justice of this realm, and in matters of civil property by much the most important of any of them. Its name, Chancery, or Cancellaria, arose from the chief judge who presides there, the Lord Chancellor, or Cancellarius, who seems originally to have been the chief scribe or secretary of the king, and had supervision of all such charters, letters, and other public instruments of the crown, as were authenticated by the king's great seal, and also the custody of such seal, and gradually became invested with judicial powers,(b) which, as early as the reign of Edward the Fourth, were frequently exercised,(c) and gradually increased, by the exertions of the Chancellors, up to the close of Lord Nottingham's career in 1682, since which time great additional powers have been given to the court and improvements made by various statutes. At first the Chancellors were ecclesiastics, *who it seems in ancient times were nearly the only persons of education; but as [*2] education and civilization advanced, the clergy gradually ceased from the study and practice of law and equity, and lay Chancellors were appointed; and from the year 1592, when Serjeant Puckering was made Lord Keeper (whose authority, by 5 Eliz, c. 18, is the same as the Chancellor's,) this court has been presided over by a lawyer, except between 1621 and 1625, when Dr. Williams, then dean of Westminster, but afterwards Bishop of Lincoln, held the seals.(d)

(a) See 1 Sp. Equity, pt. 2, bk. 1.
(b) 3 Steph. Bl. 408.
(c) 1 Sp. 349.
(d) 3 Steph. Bl. 415.

The Chancellor, or Lord Keeper, is created by the mere delivery of the queen's great seal into his custody, whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom, and has precedency next to the Archbishop of Canterbury, and before every other lord, either spiritual or temporal. Whenever a vacancy occurs in the chancellorship, the duties of that office are discharged by commissioners appointed by the crown, who are styled "The Lords Commissioners of the Great Seal," and the custody of the great seal is intrusted to the chief of such commissioners.

The business in the Court of Chancery, coupled with that of the other duties of the Lord Chancellor, having become too onerous for him to perform, the legislature, during the last session of parliament, passed an act,(*e*) under which the Court of Appeal has been instituted in chancery, presided over (either with or without the Chancellor) by two judges called Lords Justices, who have the same jurisdiction and powers, whether statutory or general, as the Chancellor, and have power to call in the assistance of any common law judge. The rank of the Lords Justices is next to that of the Lord Chief Baron of the Court of Exchequer, and, amongst themselves, according to the order and time of their appointment.

The judicial duties of the Court of Chancery had been previously for a long period, and still are shared with the Chancellor, by an officer of high rank, called "The Master of the *Rolls," who has precedency [*3] next to the Lord Chief Justice of the Queen's Bench. He was originally appointed only for the superintendence of the writs and records belonging to the common law department of the court, but accustomed to sit on the equity side as a separate but subordinate judge.(*f*) His powers were formerly much disputed; but by the 3 Geo. II. c. 30, it was enacted, that all orders and decrees by him (except what were by the course of the court exclusively appropriated to the great seal) should be valid, subject nevertheless to be discharged or altered by the Chancellor, and so that they should not be enrolled till signed by his lordship; and by the 3 & 4 Will. IV. c. 94, the Master of the Rolls is especially directed to hear motions, pleas and demurrers, as well as causes generally.

In consequence of the business of the court having greatly increased during the end of the last and the commencement of the present century, an assistant judge, who was denominated the Vice-Chancellor of England, was appointed in the year 1813, under the 53 Geo. III. c. 24; and upon the transfer, in the year 1841, of the equity business of the Court of Exchequer to this court, two more assistant judges, called Vice-Chancellors, were appointed under the 5 Vict. c. 5; but as it was provided by that act that no successor should be appointed to the Vice-Chancellor secondly appointed thereunder, on the retirement of Vice-Chancellor Wigram in 1850, no successor was appointed in his place, and for a short time there were only two Vice-Chancellors; but under an act of a late session of parliament another Vice-Chancellor has been appointed,(*g*) and

(*e*) 14 & 15 Vict. c. 83. (*f*) 3 Steph. Bl. 417. (*g*) 14 Vict. c. 4.

there are now three Vice-Chancellors, and their rank is (after the Lords Justices) next to that of the Lord Chief Baron of the Court of Exchequer, and each of them (as well as the Master of the Rolls) sit and adjudicate alone, and an appeal lies from their judgment to the Lord Chancellor or the Court of Appeal in Chancery. Although the Lord Chancellor still retains his original jurisdiction, in *practice he only exercises (except when he alone, or jointly with the Court of Appeal, has jurisdiction, as in lunacy) an appellate jurisdiction in reviewing the decisions of the Master of the Rolls and Vice-Chancellors. [*4]

It should be added, that they are also (besides an Accountant-General and various other officers) a number of officers of the court called Masters in Chancery, who have numerous important duties to perform, especially that of investigating and reporting to the court on all such matters as it thinks fit to refer to them. On this subject much information will be found in the learned works of Mr. Smith and Mr. Daniel on the Practice of the Court, and to them the reader is referred for such particulars as he may require.

*CHAPTER II. [*5]

THE BRANCHES OF CHANCERY, AND THE POWERS OF ITS JUDGES.

BESIDES that important part of the jurisdiction of chancery which is specifically called equity, and denominated the extraordinary jurisdiction of the court, in contradistinction to its ordinary jurisdiction, there are other powers and duties to which it will be as well shortly to allude. These may be classed under the following heads:—1. The Common Law Jurisdiction. 2. The Statutory. And 3. The Specially Delegated.

By the 1st, the Chancellor is a Privy Councillor, and Speaker of the House of Lords; to him it belongs to issue the writs for the summoning of parliament; and, as Conservator of the Peace, he has the right of appointing magistrates throughout the kingdom; and by having been formerly an ecclesiastic, and presiding over the royal chapel, he became keeper of the king's conscience, and visitor of all hospitals and colleges of the king's foundation, and patron of all the king's livings below the value of 20*l.* in the king's books.(*a*) He has also power of requiring security against a breach of the peace, and of issuing the writ of *supplicavit* for this purpose.(*b*) All acts of parliament are also enrolled in chancery; and further, the Court of Chancery has also the usual powers which other courts exercise respecting the nomination, suspension, dismission and control of its various officers; and, in the Petty Bag Office (whose proceedings are now regulated by 11 & 12 Vict. c. 94,) the Chancellor holds pleas of *scire facias* to repeal the queen's letters-patent, and exercises jurisdiction over petitions of right and *monstrans de droit*, for obtaining possession or *restitution of property from the crown, traverses of offices, *scire facias* upon recognizances, and [*6]

(*a*) 3 Steph. Bl. 408. (*b*) Sto. 1476.

pleas upon personal actions by or against any officer of the Court of Chancery respecting his services or attendance. Such actions, however, have not of late been frequent, and all privilege which the officers of the court had formerly, beyond others, of prosecuting or commencing proceedings in the Petty Bag Office has been taken away by the 11 & 12 Vict. c. 94, s. 37. The Chancellor had also, at common law, the issuing of all original writs: these were issued out of Chancery under the great seal, and made returnable into the Queen's Bench or Common Pleas, but as the Uniformity of Process Act(c) virtually annulled all original writs in personal actions, with the exception of dower, dower *unde nihil habet*, and *quare impedit*, this branch is diminished so as to be of very slight importance.

It should be added, that, by the 11 & 12 Vict. c. 94, s. 12, all writs, &c., out of the Petty Bag Office (except for members of parliament and restitution of archbishops and bishops) are now sealed with the chancery common law seal.

2nd. Under the *statutory jurisdiction*, or that which is derived solely from the enactments of the legislature, formerly was comprehended the Court of Delegates and a Commission of Review; but, by 2 & 3 Will. IV. c. 92, 3 & 4 Will. IV. c. 41, and 6 & 7 Vict. c. 38, the first (which was the great court of appeal in ecclesiastical matters, and was held under the authority of the 25 Hen. VIII. c. 19,) was removed to the Judicial Committee of the Privy Council, and, by the said statute of 2 & 3 Will. IV., the Commission of Review, which (as no appeal lay from the Court of Delegates) was granted by the king under the same act of Hen. VIII., in very special cases to revise the sentence of the Court of Delegates, was abolished.

Bankruptcy is a branch of the statutory jurisdiction of this court, and was first given to it by the 35 Hen. VIII. c. 4, the earliest statute on the subject; this statute was greatly modified by the 13 Eliz. c. 7, and subsequently by many others, especially by the 6 Geo. III. c. 16, whereby bankruptcy became *an important branch of chancery; but, by 1 & 2 Will. IV. c. 56, (under which a Court of Review was instituted, and continued till its abolition in 1847,) and other acts, and finally by the 12 & 13 Vict. c. 106, Courts of Bankruptcy have been instituted, to which large powers are given, subject in all cases to an appeal to the Court of Appeal in Chancery, whose decisions are, on matters of law and equity, subject to an appeal to the House of Lords, if the court deems any such matter of sufficient difficulty or importance to require the decision of the Lords.(d)

[*7]

Under this head may also be classed the large powers which are granted to the Court of Chancery by "The Joint Stock Companies Winding-up Acts" of 1848 and subsequent years,(e) also the powers which the court exercises under the acts relating to charities, railways, trustees, solicitors, and numerous other subjects.(f)

3rd. Under the *specially delegated* jurisdiction the Chancellor, by

(c) 2 Will. 4, c. 39.
(d) See 14 & 15 Vict. c. 83.
(e) 11 & 12 Vict. c. 45; 12 & 13 Vict. c. 108; 13 & 14 Vict. c. 83.
(f) See 2 D. C. P. 1710, et seq.

virtue of a special commission under the warrant of the queen's sign manual, which is countersigned by the lords of the treasury, and directed to him, has the power of administering the estates of idiots and lunatics. Although this warrant is usually directed to the holder of the great seal, as being the person whose duty it is to issue commissions of lunacy and idiotcy, it is not necessarily so directed, but may be to any great officer of the crown. This warrant, although it confers a power of administration, does not give jurisdiction, and therefore, if such power is abused, or any wrong done or error committed, the appeal is not to the Lords, but to the Queen in Council.(*g*)

It may also be added, that the Chancellor is not only the general guardian of idiots and lunatics, but also of infants, and has the general superintendence of all charitable uses in the kingdom.

*CHAPTER III. [*8]

THE NATURE OF EQUITY.

WITH respect to that branch of Chancery which is styled Equity, its origin, though somewhat involved,(*a*) seems to have arisen from the insufficiency of our courts of ordinary jurisdiction to give full and adequate relief; for the leading principles which regulate those courts were framed in an half-civilized age, when commercial successes had not brought among us their invariable concomitants, riches, luxury and refinement; and therefore, when trade, commerce and other similar pursuits altered our habits and introduced greater complications in our daily avocations, remedies proportioned to our rights and injuries became necessary, and were sought for in vain in the courts of ordinary jurisdiction,(*b*) for these courts, though they have recourse to the principles of equity in the interpretation and application of the positive law, are bound by established forms of procedure, and in some degree limited in the objects of their jurisdiction, and embarrassed by a strict adherence to rules of decision originally framed, and in some cases retained, for wise purposes, yet in their application frequently incompatible with the principles of universal justice, or not equal to their full application. Nor were the modes of procedure in these courts, though admirably calculated for ordinary purposes of justice, in all cases adapted to the full investigation and decision of all the intricate and complicated subjects of litigation which an advanced state of society require, though their simplicity, clearness and precision are highly advantageous in the ordinary administration of justice, *and to alter them materially,(*c*) would, it [*9] is feared, produce infinite mischief. To supply these defects, equity has exerted itself, and it is therefore for us now to attempt to show in what cases equity will exercise its power. It is chiefly in

(*g*) Sto. chap. 35.
(*a*) As to the history of the court, see 1 Sp. pt. 1, bk. 2.
(*b*) Copp. 27. (*c*) Mit. 4.

matters of property that it interferes, and does not take upon itself to punish but to relieve, leaving to the courts of ordinary jurisdiction everything that affects the life, liberty or reputation of individuals. Equity has been defined by St. Germain as "a right wiseness that considereth all the particular circumstances of the deed, the which also is tempered with the sweetness of mercy; and such equity must always be observed in every law of man, and in every general rule thereof, to temper and mitigate the law." Equity, however, as administered in the Court of Chancery, is not synonymous with natural justice, but has a narrower and otherwise different signification; for not only does the court (in order that it may have some rule to proceed by, and not leave the rights of individuals to depend solely on the particular opinion of the party holding the great seal,) strictly adhere to principles which have been successively enunciated by its various judges in adjudicating on the cases which have been brought before them, notwithstanding the enforcement of such principles may in particular instances occasion injustice; but also this court, as always must be the case, leaves many matters of natural justice to be disposed of in *foro conscientiæ*, from the impossibility of framing general rules respecting them, and from the mischief and inconvenience which would arise from attempting judicially to enforce such moral duties as charity, gratitude or kindness, or even positive engagements which are not founded on a good or valuable consideration. And further, a great portion of natural justice is embraced in the rules and enactments by which the decisions of courts of common law are governed and is left to be administered in such courts; so that only a portion of natural justice, and that in a modified sense, is adminstered in Chancery.(*d*) Equity, therefore, in its technical sense, contradistinguished from natural and universal equity or justice, and the sta-
[*10] tutory *jurisdiction of the Court of Chancery, and from law technically so called, may well be described as "*a portion of justice* or natural equity, not embodied in legislative enactments, or in the rules of common law, yet modified by a due regard thereto, and to the complex relations and conveniences of an artificial state of society, and *administered in* regard to *cases* where the particular rights, in respect of which relief is sought, come *within some general class of rights enforced at law*, or may be enforced without detriment or inconvenience to the community; but *where*, as to such particular rights, the ordinary courts of *law cannot or* originally *did not* clearly *afford* any or *adequate relief*, at least not without circuity of action or multiplicity of suits; or, if they can or did, cannot or did not give such beneficial or full relief, from want of power to direct such restrictions, adjustments, compensations, qualifications or conditions as may be requisite for the preservation of the rights of all interested in the property in litigation."(*e*) This equity, which is administered in Chancery, is divisible into three kinds; First, Exclusive; second, Concurrent, and third, Assistive.(*f*) Under the first, equity relieves respecting those rights for which there is no remedy in the ordinary courts of judicature, notwithstanding they are of a character demanding judicial sanction and interposition, and come within some

(*d*) Sto. ch. 1. (*e*) S. M. 2. (*f*) Sto. 75.

class of rights there enforced or capable of being so, not only in particular instances, and for the benefit of particular individuals, but in all cases, and to the advantage of the public;(g) thus, for example, in most cases of trusts, and in many cases of accidents, mistakes, frauds, penalties and forfeitures, and of anticipated loss or injury, as courts of law cannot, equity exclusively affords relief; and in many cases where there are rights on each side, as courts of law, either from their particular formula or from want of proper machinery, are unable to adapt their decisions to all the various and intricate circumstances of the case, and properly take care of the rights of all, but can only in general pronounce a positive judgment for or against the plaintiff, equity takes upon itself to interfere and do what *is just between all parties, and frequently asserts an exclusive jurisdiction by granting an injunction [*11] against proceeding in the other courts. In some, however, of the above class of cases, as well as in many others, equity has only a *concurrent* jurisdiction; thus, if adequate and complete relief is obtainable at law, but not without circuity of action (as where though one is primarily liable another is ultimately so,) or multiplicity of suits (as in many cases of contribution,) equity will interfere and give complete justice in a single suit. And in cases of contracts, as courts of law can only give damages for their breach, equity will, where damages would not be a complete compensation, enforce their specific performance; and in those cases in which the courts of law originally did not but now do give adequate relief, equity, unless prevented by legislative enactment, continues its jurisdiction, and exercises it concurrently with the other courts; for if the jurisdiction of Chancery was necessarily to cease as soon as another court assumed jurisdiction, it would involve the administration of justice in the greatest confusion and uncertainty, and be otherwise extremely detrimental.(h) The Court of Chancery has also jurisdiction when it is doubtful whether the other courts can or not give adequate relief; and in matters which are properly cognizable and relievable at law, but, from deficiency of evidence, the required assistance cannot there be obtained, equity acts in its auxiliary or assistive capacity, and provides the other courts with the necessary evidence, by compelling a discovery on oath, or granting a commission for the examination of witnesses. In cases, however, where no such assistance is required, and it is clear the courts of ordinary judicature could always give adequate relief without circuity of action or multiplicity of suits, and also take care of the rights of all persons interested, equity has no jurisdiction.(i)

The way in which equity differs from law is chiefly. 1st, In its modes of Proof; 2nd, Trial; 3rd, Relief.(k) As to the first, in the ordinary courts of law, the matter in dispute is proved by a vivâ voce examination of witnesses in *open court before a jury, who have to find [*12] the truth of the facts, and a judge, who presides, so that the manner and conduct of the witnesses are visible to those who have on their evidence to determine between the litigant parties; and thus, and by means of a searching cross-examnination before them, deception is as

(g) Sto. c. 1; Mit. 4 and 111.
(h) Ibid. 63 a, 81.
(i) Ibid. c. 1, 3.
(k) Ibid. c. 44.

far as possible prevented, and proper weight given to the evidence of each witness; while in equity, the witnesses, instead of being examined in open court before the person who has to decide on their statements, are privately examined, previous to the hearing, before examiners of the court, or commissioners specially appointed for the purpose, from written interrogatories prepared on behalf of the plaintiffs and defendants; and although this mode may appear less likely to elicit truth and enable the proper value of each statement to be estimated, yet the confusion and intimidation frequently arising from an examination in open court is thus prevented; and further, equity had, previous to the passing of the recent act on evidence,(*l*) this advantage over the ordinary courts (excepting the new County Courts,) that it could, and it still can, compel the defendant to answer on oath the charges of the plaintiff, and thus enable relief to be afforded where, if such evidence was not allowed, the greatest injustice may occur; for how numerous are the transactions of daily life in which the attendant circumstances are unknown to all but the parties concerned, and how numberless the acts of which the perpetrator is alone cognizant.(*m*) The mode, however, adopted for taking evidence is undoubtedly not altogether suited for the attainment, as it ought, of cheap, speedy and certain justice; for the practice of *privately* examining the witnesses, and of using written interrogatories, (frequently prepared without an accurate knowledge of what the respective witnesses can prove,) generally occasions great delay and expense, as well as frequent defects in the proofs required; for the uncertainty thus arising as to what proof each witness can or does give (which by an oral and public examination would be much avoided,) leads in practice to [*13] the *frequent and unnecessary repetition of evidence, so that a great and needless mass of written evidence is often accumulated at great expense and loss of time; and further, the above mode of examination nearly altogether deprives the parties of the beneficial effects attendant on a proper cross-examination. Much advantage would probably arise from carrying out the suggestions of the Chancery Commissioners in their Report for this year, 1852, (p. 266,) that the court should have full power to call and examine any witness, and that affidavits should, subject to proper rules and regulations, be made generally admissible, especially for the proof of formal matters, and also of other facts, when not objected to by the other side; and that where affidavits could not safely be used, the witnesses' examination should be taken orally in the presence of the parties or their legal advisers (not the public,) before some competent person accustomed to the examination of witnesses, and practically conversant with the law of evidence, and that such examination should be taken down in a narrative form, and after its correctness had been certified by the signature of the witness, should be signed by the examiner and transmitted to the proper office.

2nd. As to *trial*, that, in equity, instead of being as at law, before a jury, who have to inquire as to the truth of the facts, and give their verdict thereon, and a judge, who decides on any points of law that arise, and guides and directs the jury, and afterwards adjudicates on their ver-

(*l*) 14 & 15 Vict. c. 99. (*m*) Sto. 1484, 1485; D. C. P. 801.

dict, is without any jury at all, but before a judge who decides both the law and the facts; and although in matters which affect the life, liberty, or reputation of individuals, and in many others, which are decided before the courts of ordinary judicature, no system can perhaps be better adapted than a trial before a body of twelve countrymen, who have similar sentiments, pursuits, or occupations to those of the contending parties; guided by the assistance and counsel of the presiding judge; yet in most cases in which equity is called upon to decide, it seems better, especially when the high character and ability of our judges are considered, to leave the determination both *of the facts as well as of the law to them, for generally the cases in equity are of such [*14] a different nature to those at law, that they seldom require the protection or assistance of a jury,(*n*) but rather call for the decision of one who has been particularly trained to investigate the modes of fraud, and to reconcile the conflicting statements which both sides advance on their own behalves; and if cases occur in which a trial before a jury is thought necessary, the judges of this court have full power to direct one. It would, however, perhaps be better, if they had instead, power to call in the assistance of a jury, and also, if necessary, that of a common law judge. By the equitable system, a greater certainty of decision is assuredly attained than could be by the adoption of the legal mode; and even if the first may, in some particular instance, lead to an erroneous decision, still it must be admitted that, with respect to the nation at large, for whom, and not for the individual, laws and reglations are made, certainty in any branch of judicature is most desirable, even if it cannot be attained without occasional injustice.(*o*)

3rd. With respect to the *relief*. In equity, although the proceedings in most cases are necessarily more complex, dilatory, and expensive, yet from these very circumstances the judge has power to look to all the rights, both equitable and legal, of all parties interested, and make his decree with such qualifications, conditions, and regulations, that justice may be meted out to all; while at *law*, although the proceedings are generally simple, a decision must be given there for the plaintiff or defendant, so that where each has rights against the other, such rights can seldom be fully adjusted, and when the parties have remedies over against other individuals, relief cannot be adequately afforded without circuity of action and multiplicity of suits, which would occasion immense expense; nor even could justice in all cases thus be obtained, for the machinery and powers of the ordinary courts were neither *framed, [*15] nor are they suited for cases which involve any great complexity of facts, length of detail, or a mixture of numerous rights and liabilities.(*p*)

The power of the English Court of Chancery extends over persons and property within the limits of England, Wales, and Berwick-upon-Tweed, (with the exception of some peculiar and inferior jurisdictions,) but does not extend to Scotland or Ireland, nor, it seems, to the islands of Guern-

(*n*) The very few cases in which application is made for a jury in the County Courts plainly show, that for the determination of most civil rights, the intervention of a jury is not desired by the nation.

(*o*) D. C. P. 964; S. M. 13; Sto. c. 1.

(*p*) Sto. 26-29.

sey, Alderney and Sarke (these having proper courts of their own;) and where, as it frequently happens, there are persons resident within the jurisdiction of this court, who are possessed of property situate out of the jurisdiction, respecting which equitable relief is necessary, the Court of Chancery will afford relief as far as possible by means of proceedings against the person, when it can do so without infringing the regulations of other countries. Indeed, originally, this court only operated upon the conscience of the person, not upon the property or *in rem;* and it seems that it was only in the reign of James I. that it began to operate against the property, by issuing process for obtaining the possession of land, and even now the primary decree is generally against the person, although the court has full power by various processes to seize the property.(q) Thus, although a bill for partition of land in a foreign country cannot be sustained on account of the liability of the court to award a commission there, yet a bill for an account of the rents and profits of such land,(r) or a bill for a specific performance of a contract respecting such land, may, if the defendant is resident here; and in some cases by granting an injunction against a person residing within its jurisdiction, the court has proceeded so far as indirectly to overhaul the judgments of foreign courts, and even sales thereunder when they have been tainted by fraud.(s) Equity also frequently exercises jurisdiction with respect to cases in which the property in dispute is situate within the jurisdiction, but the persons against whom relief is sought are not, and by *recent acts and orders of court made under them, proper modes for serving process on such absent persons, and bringing them before the court, are pointed out, so as to facilitate the relief in such cases. Such information as the reader wishes on this subject, he can obtain by a reference to the last edition of Dan. Ch. Pract. vol. 1.

[*16]

Formerly the Court of Exchequer had a kind of concurrent equitable jurisdiction with this Court; but this, except in revenue cases, was abolished by 5 Vic. c. 5, s. 1; and the courts of Wales and of the Counties Palatine (*i. e.* of the Earl of Chester, the Bishop of Durham, and the Duke of Lancaster,) as well as of London, the Cinque Ports, and the Stannaries of Cornwall and Devonshire, together with some other minor courts, had equitable jurisdiction; but of these, the courts of Wales and Chester were abolished by 1 Will. IV. c. 70, s. 14, and the others, though they still continue, have but limited jurisdiction.(t)

The New County Courts have also certain equitable powers in respect of partnership accounts, legacies, and shares under intestacies.(u)

It may be added that, according to the maxim *de minimum non curat lex*, equity, except in cases of charity and of ancient quit-rents, refuses to interfere without the matter in dispute is of or above the value of 10*l.* or 2*l.* per annum.(x)

(q) 2 Sp. 6.
(r) Sto. 1291, 1292; Sp. 8.
(s) Ibid. 1294; Sp. 9.
(t) Mit. 6, n.
(u) 9 & 10 Vict. c. 95, s. 65; 13 & 14 Vict. c. 61.
(x) 1 Sm. Ch. 157.

CHAPTER IV. [*17]

MAXIMS APPLICABLE TO EQUITY.

In equity, as well as at law, there are various maxims which embrace the leading principles by which our courts are chiefly guided; and before further proceeding in the investigation of equity, it seems desirable to introduce some of the principal, by which the Courts of Chancery are guided.

1. "*Ubi jus ibi remedium,*" is a maxim which goes to the very foundation of both law and equity; but must be taken, not as simply meaning that every moral right has a remedy, but that every right which is considered such, either at law or in equity, will not be left remediless; therefore this maxim solely applies to rights which come within some class of rights capable of judicial enforcement, without occasioning a greater detriment or inconvenience to the community than would arise from leaving their disposal in *foro conscientiæ;* and if there is any right of this kind which, by reason of want of evidence or otherwise, no adequate relief can or could be obtained at law, equity will assist, without the person applying has lost his remedy by his own act or laches, or some other person has an equal or superior equity or right against him. Thus, thought the *forum* for the recovery of rents is generally at law, yet if no remedy can be there obtained, from uncertainty as to the property out of which the rent issues, or as to the amount or time for payment, or where a discovery or apportionment is wanted, or the legal remedy is obstructed or evaded by fraud, or gone without laches, or is inadequate, incomplete, or doubtful, equity affords assistance. Thus, at law there is no distress for rent out of tithes, and there are rents issuing out of other property without any power of distress, or *person who can be sued [*18] at law for their recovery, as a rent given by will.(a) And at law an underlessee is not liable to the original lessor; yet it seems that if the original lessee is insolvent, and the underlessee has taken possession, and there is no distress on the premises, a suit can be sustained against such underlessee.(b)

2. "*Boni judicis est ampliare jurisdictionem,*" is also a maxim applicable to equity; for if any new case occurs in which some remedy, enforcible without detriment to the community, is justly required, equity entertains jurisdiction, and gives the requisite relief; for this court originated chiefly from the deficiency of sufficient assistance in the courts of ordinary judicature, and consequently will, when necessary, extend its jurisdiction, so that injustice be prevented, and wrongs receive their proper remedies. It must not, however, be considered that the Court of Equity has no fixed rules or regulations, or that its decisions differ, as Selden remarked, like the Chancellor's foot, for, like courts of ordinary judicature, it is governed by fixed rules and principles, which are to be gathered from the various decisions and orders of its judges, and the acts

(a) Sto. 684-686. (b) Ibid. 687.

of parliament affecting this court, and from which its judges never depart without very just and cogent reasons; the maxim "*omnis innovati plus novitate perturbat quàm utilitate prodest*" being attended to here as well as at law; for if judges were to determine according to their own private views, without regard to the known laws and customs of the realm, such uncertainty would arise, that Justice herself would be lost in a sea of confusion, and the most mischievous consequences would ensue to the community, "*misera est servitus, ubi jus est vagum aut incertum;*" and it has generally been found, that whenever a standing rule of law, of which the reason, perhaps, could not be remembered or discovered, has been wantonly broken in upon, the wisdom of the rule has appeared from the inconveniences which have followed the innovations. The judges are not delegated to pronounce new laws, but to expound the old, *jus* [*19] *dicere, non jus *dare;* and it is an established rule, *stare decisis*, where the same or analogous points come again in litigation, in order to keep the scales of justice even and steady, and the decisions of the court uniform and certain, so that every one may be cognizant of his rights and liabilities; but this rule cannot hold where the formed decision is evidently "contrary to reason or divine law; for in those cases the decision was never correct, for law is the essence of reason;" and the mere recentness of the establishment of a principle is no argument against its soundness, if it is consistent with legal analogies, and not inconsistent with previous decisions.(*b*)

3. "*Equity follows the law,*" is a maxim of frequent application, although in many cases equity goes far beyond the law in supplying remedies. Its proper meaning appears to be, that where equity gives a remedy corresponding with a recognized legal one, the rules relating to the latter are strictly followed; but where it gives a remedy founded wholly on a principle of its own, and there is no corresponding course of relief at law, there it acts on its own rules;(*c*) for equity always allows the rules of law and legislative enactments to govern, and the course of law to proceed, as far as it can, without sacrificing claims grounded on particular circumstances, which render it incumbent upon this court to interfere, in accordance with the maxim, that equity suffers no right to be without a remedy. Thus limitations, whereby equitable estates and interests are created by trusts *executed*, (i. e. a trust formally and finally declared by the instrument creating it,) are construed in the same manner as similar limitations of legal estates and interests would be at law; so that, what would create an estate tail in the one case would also in the other; but the same construction does not take place where the trusts are *executory*, or not formally and finally declared by the instrument creating them, but only mentioned as intended to be so declared by a future instrument, as, for example, in marriage articles, or an agreement for a lease; for in these cases the words are not actual limitations, [*20] but simply instructions or intimations, concisely *made, as to the manner in which the author of the trust wishes the property hereafter to be settled, and therefore are construed according to the

(*b*) B. L. M. 109. (*c*) Sto. 64.

intent of the party, as presumable from the nature of the case, or from the instrument itself, instead of according to what would be the strict technical meaning of the words, so that the same words which in a settlement would have been construed as giving an estate tail, have in marriage articles been held sufficient to direct a strict settlement.(*d*)

So in cases of descent, the rules of law of equity agree, although in some instances the rule of primogeniture, and the preference given to males, may occasionally produce great hardship to the other members of the family, by leaving them, in case of intestacy, nearly destitute, while the eldest son, or heir, is placed in affluence; but here there is no sufficient equity to destroy the heir's legal right, for the property belongs to him independent of the circumstances in which the rest of the family are placed, and by the law of the realm which no court should be allowed to vary, but which, if found inequitable, it is the duty of the legislature to alter. If, however, the heir should prevent his ancestor from devising his estate, by promising to convey it to such person as the ancestor wished, although such estate would thus descend to the heir, yet equity would interpose, and make the heir perform what he had promised, for otherwise a fraud would be permitted.(*e*) So in many cases under the Statute of Limitations, and also of the defective exection of powers, equity has interposed, not by upsetting the law, but simply by decreeing what is equitable, and preventing the rules of law from working injustice.(*f*)

4. The maxim, that "*equity delighteth in equality*," or "*equality is equity*," also shows, that, where equity gives a remedy founded on principles of its own, it does not adhere to the stringent rules of law;(*g*) thus, although in administering legal assets, it allows legal priorities as to the different nature of the debts; yet, when it administers equitable assets, no such priority is allowed, but all the creditors take *pari *passu*.(*h*) So the rule at law, arising from ancient feudal principles, that, when property is conveyed to two or more persons, [*21] such persons are considered as holding in joint-tenancy, without there are some words of severance making them tenants in common, is not always attended to in equity, and, indeed, there is in this court a strong leaning against joint-tenancy in consequence of its inseparable incident, survivorship; for though each tenant may thus have an equal chance of surviving and taking the whole, yet equity considers it, in most cases where its principles are called into action, best, and most consonant with the intention of the parties, that each should have an equal certainty of an absolute share, or a share proportionate to what he has advanced; therefore, if two or more persons advance money in equal or unequal portions on mortgage of an estate, though the estate is conveyed to them as joint-tenants, equity considers their original interest in the money as subsisting, and, on the death of one or more, holds the survivors, to whom the estate survives at law, trustees for the personal representatives of the deceased as to a share proportionate to the amount he advanced; and the same rule is attended to in purchases, where the purchase-money

(*d*) Sto. 55, 56 a. (*e*) Ibid. 64. (*f*) Ibid. 56.
(*g*) Ibid. 60 a. (*h*) See title "Administration."

is advanced in unequal portions, but not if in equal; for, in such last case, equity does not consider that there is sufficient reason to prevent the rule of law from operating. In cases, also, of partnerships, the property used in the partnership business is considered as not passing to the survivors; and, indeed, with respect to personal estate this is so at law, for "*jus accrescendi inter mercatores locum non habet.*"(*i*)

5. "*Where the equities are equal the law must prevail,*" is of frequent application in equity; for if the plaintiff has only a claim to the protection of the court, which is equal to that of the defendant, equity refuses to interpose, and leaves the parties to litigate their rights in the courts of law, and thus, if, as it frequently happens, no relief can be had at law, the maxim, *in æquali jure melior est conditio possidentis*, is left to determine *the rights of the parties(*l*); thus, if a party has an equitable right to an estate, and another has an equal equitable as well as legal right, or if two have equal equitable rights and one has possession, the latter in each case must prevail. What, however, is an equal equity is frequently a point of great difficulty; but, in mere equitable claims, where no legal right or possession interferes, priority of time generally determines the rights of the claimant; thus, if A. has an equitable claim on an estate, and afterwards B., without notice of the first, obtains a similar one, the first will prevail, without B. can obtain a right at law or possession.(*m*)

[*22]

6. "*He who comes into equity must come with clean hands,*" will be found a maxim of much importance, and frequently applied in this court; thus, if a persons seeks to obtain specific performance of a contract, which on his part is tainted with fraud, or to cancel, set aside, or obtain the delivery up of any instrument on the ground of fraud to which he has been a party; and also in all other cases where both parties are truly in *pari delicto*, neither equity nor any other court of relief will interpose, unless public policy would thereby be promoted; thus, if A. agrees to give B. money for doing an illegal act, B. cannot recover the money nor (except where the thing done is against public policy) can A. obtain the delivery up of the contract, or if he has paid the money recover it back;(*n*) but if the person applying for relief is not in *pari delicto* with the defendant, as in cases of usury, for here the borrower was forced, by his necessities, to agree to the usurious transaction, or, in cases where duress or force is used to make the plaintiff consent to the illegal act, equity will assuredly relieve, for otherwise the grossest frauds would be permitted. This maxim, also, must be understood to refer only to wilful misconduct respecting the matter in question, and not to misconduct, however gross, unconnected therewith, and with which the defendant has no concern.

7. The maxim, "*He who seeks equity must do equity,*" is *closely connected with the last; for, although equity will not, according to that maxim, interfere in usurious transactions on behalf of the lender, but only on behalf of the borrower, still it will only do so upon the borrower paying what is *bonâ fide* due for principal and legal

[*23]

(*i*) Sto. 1206, 1207.
(*l*) Ibid. 57 a.
(*m*) Ibid. 58 a.
(*n*) B. L. M. 565.

interest; and, therefore, if an offer to do so is not inserted in the bill, a demurrer can be put in. So in various other cases in which parties seek relief in equity, it will be only granted to them on the terms of their doing what is just and equitable to those against whom they seek the aid of the court.(*o*)

8. "*Equity looks upon that as done which ought to have been done,*" is another maxim of importance, and is frequently applied in favour of those who have a right to the performance of a contract, or something which was intended, or ought properly, to have been, at some former time, performed, so as virtually to place them as near as possible in the same situation as if it had been performed at the proper time; thus, after a binding contract for sale of property is entered into, the purchaser is considered the owner of the property, and the vendor, of the purchase-money, so that, in case of death, the heir of the purchaser is entitled to the estate, if real, and payment of the purchase-money out of the purchaser's personal estate, and the executor of the vendor is entitled to the receipt of such purchase-money; and, further, all loss or benefit that accrues to the estate must be borne or enjoyed by the purchaser.(*p*)

*CHAPTER V. [*24]

EFFECT OF TIME IN BARRING RELIEF.(*a*)

THOUGH the Court of Equity was not, previous to the 3 & 4 Will. IV. c. 27, (which affects it as well as the courts of law,) expressly bound by the Statutes of Limitation, yet in cases similar to those in which the legislature had limited a period for the enforcement of legal rights, this court acted in analogy thereto, and considered the equitable right as bound by a like period, without fraud or other special circumstances were shown, and equity is still guided by such rule where the legal limitation is not expressly extended to it; and where the bar of the statute is inapplicable, or the demand is purely of an equitable nature, then equity, either upon analogy to the law, when any exists, or upon its own inherent doctrine, acts in accordance to the maxim *Vigilantibus non dormientibus jura subveniunt*, and refuses to entertain stale or antiquated demands, or encourage laches or negligence, holding, as the law does, that *interest reipublicæ, ut sit finis litium*, for thereby not only is the peace of the kingdom much preserved and innumerable perjuries prevented, but injustice is frequently avoided; for if plaintiffs were permitted to enforce claims at any period, however remote, there would be danger of such claims being fraudulently delayed until the defendants had, by death or other casualty, lost the evidence by which they might once have been successfully encountered, and parties would be liable to suffer great hardships by eviction after long possession, not originating in any wrong or

(*o*) See "Cancellation of Instruments," *infra.*
(*p*) See "Specific Performance," *infra.*
(*a*) See generally hereon, Shelf. R. P. 5th ed., pp. 1-279.

misconduct of their own, and all certainty of title would be lost.(*b*) [*25] Equity, moreover, *from a due sense of the great evils which might arise from the revival of antiquated claims, frequently refuses to render assistance, even though the legal limit has not been passed, especially if by reason of the delay, rights have been acquired which it would be unjust to disturb, considering that the claimant by his delay has either acquiesced in the right of the other party, or forfeited his right by negligence, without fraud or other circumstances appear, which rebut such a presumption; and the 3 & 4 Will. IV. c. 27, although, as before stated, affecting the Court of Chancery, does not at all interfere with any rules or jurisdiction of equity, in refusing relief on the ground of acquiescence or otherwise, even though the claimant may not be barred by the act (s. 27.) When, therefore, relief is desired from the Court of Equity, its assistance should be sought with as little delay as possible, or some good reason shown why the application was not sooner made. Acquiescence arises where a person having a right stands by and sees another dealing with the property in a manner inconsistent with such right, and makes no objection; but there can be no acquiescence, so long as the same circumstances of undue influence on one side, and of distress on the other, as those in which the oppression commenced, continue to operate, and equity will never refuse to assist on the mere ground of delay, if thereby it would encourage or might in any manner protect unrighteous conduct, or the abuse of confidence; and no length of time will bar a fraud, unless there be negligence or delay after its discovery, the party defrauded not being under pressure or undue influence, for delay cannot purge a fraud, every delay adding to its injustice; and by the statute of the 3 & 4 Will. IV. c. 27, s. 26, for the limitation of real actions, the legislature has expressly enacted, in respect of land and rent, that the period allowed for taking proceedings in cases of concealed fraud is only to be calculated from the time when it was or might, with reasonable diligence, have been discovered. In cases of direct or express trusts also, no length of time will, as between the trustee and cestui que trust, be a bar, except under special circumstances; for the possession [*26] of the *trustee is that of the cestui que trust; and although by the 25th section of the last mentioned statute it is provided that as against a purchaser for valuable consideration of land or rent, subject to an express trust, the period of limitation shall be considered as running from the time of the conveyance to the purchaser, there is no limit as against the trustee. Trusts by implication and constructive trusts, however, are it seems within the Statute of Limitations, and equity will not allow a trust to be made out by implication or construction, after a great length of time, both from the presumed abandonment and from the difficulty of then ascertaining the true state of the case. This, however, only applies where the trust is to be made out by evidence, and not where it arises on the face of the instrument, and therefore the representatives of a party expressly named in a will are to be considered as express trustees; and though the statute limits the time within which a legacy can be

(*b*) 3 Steph. Bl. 545.

received, yet if money is bequeathed to an executor upon trust, it becomes, as soon as it is severed from the other assets, a case of an express trust to which the statute does not apply.

As the period of limitation which the legislature has thought proper to declare in cases of land and rent is by the 24th section of the 3 & 4 Will. IV. c. 27, expressly extended to suits in equity, and its judges likewise are much guided by the other statutes of limitation, it has been thought advisable to refer shortly to the periods which the various statutes have fixed.

With respect to the *crown*, it was formerly considered as bound by no lapse of time, and in many cases such is still the fact, from the rule, that it is not affected by acts of parliament without being expressly named, except where they are made for the public good, the advancement of religion and justice, and the prevention of injury and wrong; accordingly it was not bound by the old Statute of Limitations, nor, as it seems, by the present statute of 3 & 4 Will. IV. c. 27. Some statutes, however, are specially extended to the crown, for by the 21 Jac. 1, c. 2, it was estopped from recovering lands *against a title which had [*27] accrued sixty years previously to the then session of parliament; and it seems the Prescription Act of 2 & 3 Will. IV. c. 71, and the act of 2 & 3 Will. IV. c. 100, respecting tithes, limit the crown as well as others, and the 9 Geo. III. c. 16, expressly enacts that it must sue for lands, &c., (except liberties and franchises) within sixty years. This statute, however, does not extend to reversions and remainders, or limited estates, and contains various provisoes and exceptions.

It should also be added, that where the claim of the crown is only derivative, it must stand in the same situation as its principal; thus, if a crown debtor is barred as against his debtor, the crown will be also, without the right vested in the crown previous to the expiration of the time of limitation.

By the prescription Act of 2 & 3 Will. IV. c. 71, and which came into operation on the first day of Michaelmas Term, 1832, rights of common and other profits *à prendre* (excepting tithes, rents, and services) cannot be defeated after thirty years uninterrupted enjoyment merely by showing their prior commencement, but may in any other way by which they then were liable to be defeated, as by enjoyment under an agreement or otherwise; and after sixty years of such enjoyment, are made indefeasible, unless they were enjoyed under an agreement by deed or writing; and by the 2nd section, ways and other easements, watercourses, and the use of water is subject to a similar limitation, except that the periods are made twenty and forty years, instead of thirty and sixty years; and rights of light are by the 3rd section made absolute after twenty years of uninterrupted enjoyment, unless had under an agreement by deed or writing; and such periods are those next before the commencement of proceedings respecting the right, and not before the act complained of, so that the enjoyment must be up to or within a year of the commencement of the suit.(*d*) Nothing is deemed an in-

(*d*) 15 Mee. & W. 242.

terruption unless it has been acquiesced in for a year after notice, so
[*28] that the right cannot be defeated within the last year of the period *allotted for the particular right by an interruption of it; and therefore, where light was obstructed by building up a wall after an uninterrupted enjoyment for nineteen years and three hundred and thirty days only, and an action was after the twenty years and within a year of the obstruction brought, it was held maintainable.(e) The enjoyment must have been of the easement or other matter as such, continuously for the period mentioned by the act; therefore an enjoyment by unity of possession, as of a road over land in the party's own possession, can give no right; and further, the enjoyment must not be had secretly or by stealth, or tacit sufferance, or by permission asked from time to time, but openly, notoriously, without particular leave, or danger of being treated as a trespasser, and as a matter of right; and all presumptions of title is taken away, from an enjoyment for a less period then that specified by the act for each particular case. And by the 7th section the time during which any person capable of resisting any claim is an infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, or during which any proceeding shall have been pending, and diligently prosecuted until abated by death, is excluded from the computation of the before-mentioned periods, except where the right is declared indefeasible; and by the 8th section a reversioner, after a lease for life or years exceeding three, is allowed, in cases of ways, water-courses, or the use of water, three years after the *determination* of the term, notwithstanding the forty years have elapsed.

With respect to tithes, by the 2 & 3 Will. IV. c. 100, a modus or discharge, supported by thirty years usage, is good against the crown and lay persons (not corporations sole,) and corporations aggregate, unless such usage is shown to have been under an agreement by deed or writing, or to have been different prior to the thirty years; and is absolutely valid if supported by usage of sixty years, unless under an agreement by deed or writing; and as against a bishop, parson, or other corporation
[*29] sole, is valid and indefeasible if supported by usage *during two incumbencies and three years after the institution of a third, or sixty years and such three years as aforesaid, whichever is longest, unless under an agreement by deed or writing. The time during which the owner of the land and tithes is the same person, is excluded in the above periods; and, except where the claim is made absolute, the time during which the party otherwise capable of resisting the claim is an infant, idiot, *non compos mentis*, *feme covert*, or lay tenant for life, or during which any action or suit shall have been pending and diligently prosecuted until abated by death, is also excluded, and no presumption of right by usage for less then the before mentioned periods is allowed.

By the Real Property Limitation Act of 3 & 4 Will. IV. c. 27, which came into operation on the 1st of January, 1834, all (except the crown and ecclesiastical and eleemosynary corporations) are estopped from commencing proceedings for the recovery of land or rent after twenty years

(e) 8 Cl. & Fin. 231.

from the first accrual of right to themselves, or those through whom they claim, except the party entitled at the time of such accrual was an infant, covert, unsound in mind, or absent beyond the seas, in which case, notwithstanding the lapse of twenty years, ten years from the ceasing of the infancy, or other disability by death or otherwise, is allowed, not exceeding in the whole forty years from such first accrual, but no time is allowed for successive disabilities (s. 2, 16, 17 and 18;) and, in cases where parties had existing rights at the time of the passing of the act, they were allowed, notwithstanding the lapse of twenty years, until the 24th of June, 1838, for the commencement of their proceedings (s. 15.)

The first accrual of the right by s. 3, is in case of an estate in possession, to be dated from the loss of possession or last receipt of rent, or death of the last person in possession, or alienation of one in possession (other than by will) to an alienee who never entered; and, in case of an estate in *futuro*, from the time such estate became one in possession, or, if the right arises from a forfeiture or breach of a condition, then from such forfeiture or breach; but if the reversioner omits to take *advantage of the forfeiture or breach, he has a new right on the [*30] estate falling into possession (s. 4 and 5.) The interval between the death of a party and the grant of probate or administration is not deducted (s. 6;) and as against tenants at will, the period of limitation is computed either from the determination of the tenancy or the expiration of a year from its commencement, whichever first happens (s. 7.) Mortgagors and *cestuis que trust* are, however, specially excluded from the operation of this section; and in cases of tenants from year to year and other periods without a written lease, the time dates from the first of such years or other periods, or later receipt of rent (s. 8;) and as against tenants generally, the receipt of the rent is the same as the receipt of the profits of the lands (s. 35;) and where land or a rent-charge(*f*) is leased by writing at a yearly rent of twenty shillings or upwards, then the time of the accrual dates from the last rightful receipt of the reserved rent, and no new right (as in case where the rent is under twenty shillings) is given on the determination of the lease (s. 9;) and for the purpose of this act, mere entry is not equivalent to possession (s. 10;) nor can any right be preserved by continual claim (s. 11;) nor is the possession of one coparcener, joint-tenant or tenant in common, considered as the possession of the others (s. 12;) nor the possession of a younger brother, or other relation of an heir, that of the heir's (s. 13;) but a written acknowledgment signed by the party in possession, or receipt of the rents, and given to the party claiming, or his agent, is made equivalent to possession or receipt (s. 14;) and no descent cast, discontinuance, or warranty, since 1833, defeats a right of entry (s. 39.)

Where a person is entitled to an *estate* in possession and in *futuro* in the same property, if his right in possession is barred, his right in *futuro* will be also (s. 20;) and where a tenant in tail is barred, those he could have barred are likewise prevented from recovering (s. 21;) and if such tenant in tail dies before the full period has elapsed, the successor is

(*f*) Doe d. Angell v. Angell, 9 Q. B. 356.

only allowed the same time as the tenant in tail would have had if he
[*31] had *not died (s. 22;) and where possession has been had under an imperfect assurance of an entailed estate for twenty years after the tenant in tail making such assurance, or person succeeding to such entail could by such an assurance have barred the estate in *futuro*, such estates are barred (s. 23.) Mortgagors are barred at the end of twenty years after the mortgagee takes possession, or gives a written acknowledgment, signed by himself, to an owner of the estate, or his agent, whichever last happens, and where an acknowledgment is given by one of several mortgagees, such affects only the person giving it (s. 28;) and by 1 Vict. c. 28, mortgagees are enabled to recover the land mortgaged at any time within twenty years after the last payment of any principal or interest, notwithstanding more than such period has elapsed from their first right of entry, and this right is not only against the mortgagor in possession, but also against a stranger, even though such latter might, since the creation of the mortgage, have obtained by adverse possession a good title as against the mortgagor.(*g*)

Ecclesiastical and eleemosynary corporations are estopped from commencing proceedings after two incumbencies and six years after the appointment of a third incumbent, or sixty years, if that be longer (s. 29;) and no proceedings are to be commenced for advowsons after three incumbencies or sixty years, whichever is the longest (s. 30;) an incumbency after a lapse is reckoned, but not one after a promotion to a bishopric (s. 31;) and in no case is an advowson to be recovered after one hundred years (s. 33;) nor is there any saving of the rights of persons under disabilities, and persons whom a tenant in tail could bar are put in the same position as the tenant in tail (s. 32;) and by s. 34, the right of the person who was out of possession is, in respect of land, rent and advowsons, extinguished by the lapse of the before-mentioned periods, so that the party in possession obtains a good title, which it seems he can compel a purchaser to accept.(*h*)

[*32] By the 40th section, mortgages and other charges on land *or rent, and legacies, are irrecoverable both at law and in equity, when twenty years have elapsed since the first existence of some one capable of giving a discharge, unless an acknowledgment signed by the person liable, or his agent, has subsequently been given to the person entitled, in which case the twenty years are calculated from such acknowledgment; and the statute does not run if any payment of principal or interest has been made during such period, or the interest is payable and receivable by the same party;(*i*) and, by the 41st section, no more than six years arrears of, or damages in respect of, dower are recoverable; nor, by the 42nd section, can arrears of rent or interest in respect of money charged on land or rent, or in respect of any legacy, or damages in respect of rent or interest, be recovered as against the property after six years from the time they became due, without a subsequent written acknowledgment, signed by the party chargeable, or his agent, has been within

(*g*) 20 L. J. (Q. B.) 431-434.
(*h*) Scott v. Nixon, 3 Dru. & War. 388; and see 1 Jon. & L. 36.
(*i*) Kirkwood *v.* Selby, 12 Ir. Eq. Rep. 585.

the last six years given to the person entitled, or his agent; a subsequent incumbrancer, however, is allowed, during a year next after a prior one has been in possession, to recover for the whole period such prior incumbrancer had possession; and, by 3 & 4 Will. IV. c. 42, s. 3, twenty years' arrears of rent, annuities and interest, if secured by covenant, may be recovered as against the person.(*k*)

The word "land," by the 1st section, is made to extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (except those belonging to a spiritual or eleemosynary corporation sole,) and also to any share, estate or interest in them, or any of them, whether the same shall be a freehold or a chattel interest, and whether freehold or copyhold or of other tenure; and "rent" is extended to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land, except moduses or compositions belonging to a spiritual or eleemosynary corporation sole, and except that as to heriots and other *payments which become payable at greater intervals than twenty years, they are probably either excluded from the [*33] act, without they come within the 40th section, or each individual payment only is barred by the lapse of twenty years.(*l*) It must also be remembered that "rent" and "tithe," as used in this act, mean the estate in rent and tithe, not the thing itself, except where, as in the 42nd section, arrears are spoken of.(*m*) Turnpike tolls are not within the act, nor, it seems, a personal annuity, without there is some charge on land or rent;(*n*) but the interpretation clause does not limit the meaning of the word rent, so that it extends to any money or other thing which is rendered periodically out of, or in respect of land, as where a tenant holds by cleaning the church, ringing the bells, or otherwise. The 1st section also enacts, that the person through whom another claims, means any person by, through, under, or by the act of whom, the claimant became entitled as heir, issue in tail, tenant by courtesy, or by dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee or otherwise, or by escheat.

It is also well to mention, that where previous to this act an entry was barred by fine with proclamations, persons are allowed five years from the accrual of their rights or the removal of their disabilities (if laboring under any) to take proceedings.(*o*)

By the 21 Jac. I. c. 16, actions of account (except between merchants, for which there is no limit) and upon the case (except slander, which is two years,) and actions of debt grounded on any lending or contract without specialty, and actions for arrears of rent, and of trespass (except assault, battery and wounding, which are four years,) detinue, trover and replevin, are to be commenced within six years after the accruing of the right or determination of any disability which existed at the time of such accrual, arising from infancy, marriage, unsoundness of mind, imprison-

(*k*) Hunter v. Nockolds, 19 L. J. (Chan.) 177.
(*l*) 16 Mee. & W. 566; 19 L. J. (Exch.) 177.
(*m*) 9 Mee. & W. 113; 15 Ibid. 617.
(*n*) 6 Hare, 531.
(*o*) 4 Hen. 7, c. 24.

[*34] ment, or *absence beyond the seas; and the 4 & 5 Ann, c. 16, s. 19, gives the claimant the same period after the return of a defendant, who at the time of the accrual of the right is beyond the seas; and with respect to proceedings on specialties and recognizances, they are by the 3 & 4 Will. IV. c. 42, to be brought within ten years of that session (1833,) or within twenty years after the cause of action or suit; and actions for penalties, damages, or sums of money given by statute to the party grieved, are to be brought within one year after that session, or two years after the cause of action; and actions of debt upon an award, where the submission is not by specialty, or for any fine due in respect of copyhold estates, or for an escape, or money levied on a *fi. fa.*, within three years of that session, or six years after the cause of action; and persons who at the time of the first accrual of the right are infant, *feme covert*, *non compos mentis*, or beyond the seas, have a similar time allowed after the ceasing of the disability; and where at the time of such accrual the defendant is beyond the seas, the limitation only dates from his return (s. 4;) and an acknowledgment, either by writing signed by the party liable, or his agent, or by part payment or satisfaction on account of principal or interest, gives a fresh right of action from which to compute the period of limitation in respect of specialties, and recognizances (s. 5;) and generally in all cases of simple contract debts, part payment of principal or interest by money or otherwise, is sufficient to keep the debt alive; and by the 9 Geo. IV. c. 14, although acknowledgment by words only is insufficient, yet a written promise or acknowledgment from which a promise can be implied, signed by the party chargable, takes a debt out of the operation of the Statute of Limitations, but where there are two or more liable, only against the person making the promise or acknowledgment; part payment, however, by one of two jointly, or jointly and severally liable, keeps the debt alive against both, except where it is made after the decease of one, or some other severance of the debt, as by bankruptcy or insolvency.(*p*)

[*35] *No part of the United Kingdom, nor the islands of Man, Guernsey, Jersey, Alderney and Sark, nor the islands adjacent to them, being Her Majesty's, are to be deemed beyond the seas under the before-mentioned acts of the 3 & 4 Will. IV. c. 27, and c. 42,(*q*) or the 21 Jac. I., but Ireland is beyond the seas within the 4 Ann. c. 16, s. 19. It seems that if one of several persons liable is beyond the seas, the statute does not run till his return, but otherwise if only one of the plaintiffs is.(*r*)

A new cause of action is considered as arising on each breach of a condition to do various things, and although the day on which the cause of action arises is probably included, the statute does not begin to run until there is a complete cause of action; therefore, on a sale of goods on credit, the time is from the expiration of the credit; and on a bill payable at sight, or at a fixed time after demand, from the sight, or time after demand, but where payable on demand, from the date; and at law,

(*p*) 5 M. & W. 494; 2 B. & C. 25; 21 L. J. (Exch.) 4.
(*q*) Sec. 19 of 3 & 4 Will. 4, c. 27, and s. 7 of c. 42.
(*r*) 7 Q. B. 811; 4 T. R. 516.

in case of injury by negligence or breach of promise, from the act complained of, though the injury does not then arise, or is not discovered until a long time afterwards; and it is doubtful whether equity will interfere after the legal period, although in many cases, as where the injury has not arisen or been discovered sufficiently early to enable relief to be obtained at law, it seems just that it should, and it no doubt would, if fraudulent conduct in the defendant could be shown.

Although a conveyance or devise upon trust to pay debts will not, without express mention, revive a debt which is barred, yet it will from the time of its operation stop the running of the statute. A general direction or bequest to pay debts out of personal estate, however, will not, such estate being legally liable for their payment. The time between the death of an intestate and grant of letters of administration, is not counted, except in cases under the 3 & 4 Will. IV. c. 42, (see s. 6,) or where the statute has commenced running before the death.

*It should be added, that though in cases of land, rent, or advowsons, the right is, under the 34th section of 3 & 4 Will. IV. c. 27, extinguished by the lapse of time, yet in other cases the remedy only, and not the right, is barred, and therefore a lien on papers or other personal chattels is not lost by lapse of time.(s) [*36]

By the 5 & 6 Vict. c. 97, proceedings for matters done under public local and personal, or local and personal acts, are to brought within two years after the act complained of, or, in case of continuing damage, within one year after its ceasing.

*PART II. [*37]

DIVISION OF EQUITY.

THE two great objects of the Courts of Equity are, firstly, to prevent injury and fraud as far as possible; and secondly, to redress injury and fraud after its commission, and with the view of carrying out these objects, most of their rules and regulations are framed. The following division(a) of equity jurisprudence into six heads will however, best enable us to treat of the subject:—

I. Remedial—under which may be classed frauds, accidents and mistakes.

II. Executive—under which will be considered trusts, charities and specific performance.

III. Adjustive, or that which relates to administration, legacies, mortgages, partnerships, agencies and other matters of account, partitions and boundaries.

(s) 16 L. J. (Q. B.) 355.

(a) This division is similar to and was suggested by that which Mr. Smith has adopted in his valuable Manual of Equity.

IV. Protective—under which will be classed injunctions, interpleader, &c.

V. Protective in favour of persons under disability, as married women and infants.

VI. Auxiliary—under which discovery and the perpetuation and preservation of evidence will be discussed.

[*38]

*TITLE I.

REMEDIAL EQUITY.

CHAPTER I.

OF ACTUAL FRAUD.

OVER fraud more than over any other branch of equitable jurisdiction, the Court of Chancery has probably exercised its authority, most beneficially, for by its power of discovery and of compelling defendants to answer on oath, it has frequently brought to light transactions which were effected in the presence of no witness, or of persons who have long ceased to exist, and thus discovered frauds, which for years have lain hid, or otherwise would never have been ascertained, and compelled their perpetrators to redress the injuries thereby occasioned; and although equity only takes cognizance of fraud in a civil and not in a criminal point of view, so that (further than by enforcing compensation and payment of costs) it never punishes the offenders, but leaves such punishment to the courts of criminal judicature, it asserts its jurisdiction not only for the purpose of redressing, but also, as far as possible, for, the prevention of frauds and other acts or matters which partake of a fraudulent nature.

Our English inquisition, the Star Chamber, before its abolition by 16 Car. 1. c. 10, in numerous instances took cognizance of fraudulent transactions, and also punished the offender; but when it was abolished, the jurisdiction of examining and redressing frauds fell almost completely on the Court of Chancery, from the inability which the law courts had of thoroughly sifting and discovering the fraud, while the *punish-
[*39] ment of the guilty party was transferred to the criminal courts. But although equity is generally the proper forum for examining into and redressing fraud, courts of law, in a great variety of cases, take cognizance of it, and frequently afford adequate relief, as in the case of fraud respecting the sale of chattels personal; and so where a will of personal property has been obtained by fraud, the proper remedy is exclusively vested in the Ecclesiastical Court, or if the will is of real estate, in the Courts of Common Law; and although Lord Hardwicke is reported to have said that equity has "undoubted jurisdiction to relieve against every species of fraud," yet it seems that where in the particu-

lar case adequate relief can be easily obtained at law, and in similar cases relief is ordinarily sought there, equity will not interfere, unless from want of evidence or other reason the fraud could not be shown at law, or the redress which would be there afforded might not in the particular case be sufficient, thus equity assists respecting frauds, which go either to the whole, or part of a will, provided the Ecclesiastical or Common Law Courts cannot give the required relief, although it will not, if they can; thus where a fraud has gone only to some clause in the will, or has consisted in unduly obtaining the consent of the next of kin to the probate, equity, although it cannot revoke the probate, has declared the person taking the legal title by virtue of such fraud a trustee for the person who has thus been deprived of the property. All kinds of fraudulent transactions, and also all deeds and other instruments, whether under seal or not, as well as private acts of parliament, when obtained by or affected with fraud, have been relieved against, and length of time forms no bar, although the court hesitates to relieve where length of time affords the presumption of acquiescence.(*a*)

As the modes of fraud are infinite, it is impossible to give a strictly accurate definition thereof; the following, however, seems to afford as good a one as can be given, namely, that fraud in equity includes "all acts, omissions, and concealments, *which involve a breach of a legal or equitable duty, trust or confidence justly reposed, and [*40] which are injurious to another, or by which an undue and unconscientious advantage is taken of another."(*b*)

Frauds are usually classed and treated of under the two heads of *actual* and *constructive*, the former of which has been defined as "any cunning, deception, or artifice, used to circumvent, cheat or deceive another, to his injury;"(*c*) and the latter being such acts, statements, or omissions, which operate as virtual frauds upon others, or if generally permitted, would be prejudicial to the public welfare, and are not clearly resolvable into mere accident or mistake, but may have been unconnected with any selfish or evil design, or may amount in the opinion of the party chargeable therewith to nothing more than what is justifiable or allowable.(*d*)

The following rules have been laid down respecting fraud: 1st. That it is not to be presumed either at law or in equity, according to the maxim *omnia ritè presumuntur*, but neither at law nor in equity is positive proof indispensably necessary, and a court of equity will act on a lower degree of proof than what would be requisite at law, and sometimes considers that a fraud which at law is not so considered. 2nd. If the principal in a fraud is released, those who were only secondarily liable will be released also. 3rd. A deed impeached for fraud cannot be supported by evidence of considerations wholly different from those stated in it. 4th. If a deed or other document is obtained by fraud, it will be set aside in toto, and not only in part. Fraud, however, may invalidate one part of a document without making the whole invalid, if the fraudulent part can be severed.(*e*)

(*a*) See p. 25, *sup.* (*b*) Sto. 187. (*c*) Ibid. 186.
(*d*) Ibid. 186-189. (*e*) 1 Mad. 261.

Most cases of *actual* fraud are comprehended under the following heads; namely,—

1st. Those occasioned by the conduct of the party charged, irrespective of the position or condition of the party on whom the fraud was committed.

[*41] *2nd. Those in which the position or condition of the person on whom the fraud has been committed, is, in a great measure, considered as the ground for relief.

1. Under this head may be ranked—

1st. *Concealment*, or *suppressio veri*,—which is frequently a fraud; and therefore if a person conceals facts which he is under some legal or equitable obligation to communicate, equity relieves. It is, however, often most difficult to predicate what persons are bound to disclose *in foro conscientiæ*. According to the golden maxim, to do unto others as we would they should do unto us, each party ought to communicate to the other his knowledge of all material matters or facts not discoverable by the other, or of which he knows the other to be ignorant; but in equity so extensive a rule could hardly be enforced without great inconveniences arising therefrom, on account of the encouragement which would thus be afforded to carelessness and negligence, and the frequent litigation which would ensue in attempting to upset contracts which turn out not so favorably as was expected. Equity, therefore, in many cases applies the maxim *caveat emptor*, and holds the purchaser bound, unless there is some misrepresentation or artifice to disguise the thing sold, or some defect known to the vendor, which the purchaser could not by ordinary care discover, or some warranty as to the character or quality of the article, notwithstanding there may be material defects or circumstances known to the one and not to the other; nor will it account silence as equivalent to concealment, for *aliud est celare, aliud tacere*, except that where a person allows an untrue statement which he has made, to circulate without contradiction, *qui tacet consentire videtur* is held to apply, and he is made liable for an injury resulting thereby.(*f*) And so it seems equity will relieve if a person does not disclose a material fact, which from its nature he must have known, or it is proved that he knew, and which the other could not be expected to discover by ordinary care.

[*42] Not only does equity relieve respecting defects *and circumstances which are called *intrinsic*, and belong to the nature, character, condition, title, safety, use, or enjoyment, &c., of the subject-matter of the contract, but also respecting those which are designated *extrinsic*, and are only accidentally connected with it, or rather bear upon it, at the time of the contract, as to the rise or fall of the market, character of the neighbourhood, &c.(*g*) In illustration of what has been observed, if a vendor sells an estate, knowing that he has no title to it, or that there are incumbrances upon it of which the purchaser is ignorant,(*h*) or if the insured omits to communicate to the insurer all facts and circumstances which increase the risk,(*i*) relief will be afforded; for in these cases the injured person had no means of discovering the same, and was

(*f*) 5 Bing. N. C. 99. (*g*) Sto. 210. (*h*) Ibid. 212. (*i*) Ibid. 216.

not guilty of negligence. But a purchaser is not bound to communicate his knowledge of the value of the property, for it is the vendor's place to be acquainted with it; therefore if A., being aware that there is a mine in land of B., of which the latter is ignorant, contracts, without disclosing the fact, for the purchase, the contract is good, though nothing was paid because of such mine.(*k*)

2nd. *Misrepresentation*, or *suggestio falsi*, whether by word or deed, and whether with the object of gain or not, is also considered as fraud. Generally, however, equity will not relieve, if the misrepresentation was in an immaterial or trifling matter, or if it occasioned no injury; for in the first case the evils resulting from litigation would be more serious than the injury which has occurred, so that *de minimis non curat lex;* and as to the other, equity only attempts to redress wrongs, and not to punish the perpetrators. Nor will this court interfere where the party injured did not act upon the misrepresentation, but on something else.(*l*) Nor is any relief afforded where the misrepresentation was in a matter of fact or opinion equally open to the inquiry of both concerned, and in which neither could be presumed to trust the other, or was as to a *defect which a cautious person could easily have discovered, for *simplex commendatio non obligat*, or it was vague and inconclusive.(*m*) And the court will avoid encouraging carelessness by redressing injuries which by proper or ordinary care could have been prevented.(*n*) It is a question of some difficulty whether a person who makes an untrue statement, under the impression that he is stating the truth, is guilty of a fraud. In some cases it has been held that persons are liable for all incorrect statements, whether made knowingly or not, if they occasion an injury to another; while from the more recent cases it seems that both at law and in equity a mere untruth, innocently told is not sufficient; but that to make a fraud, some *wilful* misrepresentation must be shown; in fact, that circumstances must be shown from which it may be gathered that the representation was made with a knowledge of its untruth: except that in the case of victuallers, brewers, and other common dealers in provisions, they are civilly liable if in the ordinary course of trade they sell things unfit for food, without any knowledge of their unfitness.(*o*) It would, however, seem just that every one should be made liable for injuries arising from all erroneous statements, for no one ought to state as a fact that which he does not know. There is no doubt, however, that a party who makes representations which to his knowledge at the time are false, and from which injury ensues, is liable, although they were made from no bad motive, and without any design to injure any one.(*p*) [*43]

3rd. Mere *inadequacy* of consideration, or other inequality in the bargain, does not of itself constitute fraud, for value is always fluctuating, being dependent on innumerable circumstances; and persons are often induced by difficulties, and numerous other reasons, to part with property at certain periods for less than its real value, and the smallness of the price may have been the sole inducement to the purchaser, who

(*k*) Sto. 207, n. (*l*) Ibid. 191-202. (*m*) Ibid. 192.
(*n*) Ibid. 200. (*o*) B. L. M. 628. (*p*) Sto. 623.

may have simply acquiesced in the other's proposals instead of originating
[*44] the transaction, or taking an active part *therein, like one who endeavours to obtain a fraudulent advantage over another. If, however, the inadequacy or inequality is accompanied with other circumstances showing fraud or imposition, as where the party injured is hurried into the transaction without full knowlege of the circumstances or consequences, without sufficient time for deliberation, or opportunity for consulting disinterested friends or counsel, or the matter is importunately pressed, or those in whom he placed confidence used strong persuasion, equity will relieve; and so will it where the inequality is so gross as to shock the conscience, or where there has been imposition or undue influence.(q)

4th. Previous to the passing of the 9 & 10 Will. III. c. 15, equity exercised a general power over *awards;* but since that statute it does not interfere (except under it) respecting any awards which come within its operation, although it is still exercises an original jurisdiction in those cases in which it has *not* been arranged or agreed that the submission or award shall be made a rule of court, and will therefore set aside such awards on the ground of fraud, as in cases of corruption, partiality, or other irregularity of conduct in the arbitrator.(r)

The statute authorizes submissions to be made rules of a court of record either of law or equity, and gives the court, to which the submission is made, power on affidavit, to set aside the award if procured by undue means.(s)

II. Under the second division of actual frauds are, 1st, Those upon idiots, lunatics, and others of *unsound mind;* thus, in cases of contracts or other acts, however solemn, of such persons, whenever, from the nature of the transaction, there is no evidence of entire good faith, or it is not seen to be just in itself, or for the benefit of such persons, equity will, on the ground of fraud, interfere, and either set it aside or so model it as to make it subservient to their just rights and interests; for although
[*45] such persons, having no understanding or agreeing *mind, cannot have the capacity to contract (except for necessaries,) yet the ground of relief is generally fraud, for no man of full age is allowed to stultify himself; and, therefore, although other persons, such as heirs and administrators, and also guardians and committees, can at law, generally, object to and avoid contracts on the ground of *non compos mentis*, equity will not, therefore, always afford assistance, but generally does so in case of fraud; and even at law an executed contract entered into *bonâ fide*, and in the ordinary course of business, with a lunatic, is not void, if the lunacy was unknown;(t) and where there has been entire good faith, and the contract or other act was for the benefit of such persons, equity will uphold it, and sometimes even courts of law.(u)

2nd. With respect to the contracts and other acts of persons of *weak understanding*, although not necessarily void, they are in equity viewed with great jealousy, and deemed void whenever their nature justifies the conclusion, that there has been imposition, artifice, or undue influence;

(q) Sto. 244 et seq. (r) Wils. Aw. 90, 388. (s) 2 & 3 J. & B.
(t) 18 L. J. (Exch.) 356. (u) See S. V. & P. 885.

and, therefore, if a person, who, from blindness, ignorance, or other cause, is liable to be deceived, is induced to execute a deed, on the supposition that it is different from what it is, the deed will be void.(x)

3rd. Equity will also refuse to assist a person who obtains an agreement or deed from one, who, at the time of the transaction, is so excessively *intoxicated* as to be deprived of understanding, and will assist the intoxicated person, even if he became so from his own fault, in getting rid of it, on account of the fraud in the other in obtaining the same from one in such a state, especially if there was any unfair advantage taken, or any contrivance to cause intoxication.(y)

4th. And where a person is not a *free agent*, and able to protect himself, equity will do so, and consequently it relieves against acts done under duress, or under the influence of extreme terror or threats, and watches with extreme jealousy *all contracts made by persons under imprisonment, and, whenever there is the slightest ground [*46] to suspect oppression or imposition, will upset the contract, and, in like manner, with respect to the acts of persons labouring under that extreme distress or necessity which overpowers free agency, relief is given if any fraudulent advantage has been taken.(z)

5th. With respect to *infants*, though acts which the law requires them to perform, and contracts respecting necessaries suitable to their degree or quality, are good, yet these must be fair and proper; and further, where a contract or other transaction may be either beneficial or prejudicial to the infant, he may generally avoid it as well at law as in equity; but where it can never be for his benefit, it is utterly void.(a)

*CHAPTER II. [*47]

CONSTRUCTIVE FRAUDS.

THESE *frauds* may be treated of under four heads.

I. Frauds on persons particularly liable to imposition.
II. On persons in confidential situations.
III. Virtual frauds on persons not particularly liable to imposition, or in any confidential situation.
IV. Frauds against public policy.

I. Where parties, on account of the particular circumstances which surround them, irrespective of mental disability, are likely to be easily imposed upon or taken advantage of, equity will frequently afford relief on the ground of constructive fraud, even in cases where the transaction, if entered into by parties otherwise situated, could not be impeached.

1st. Thus equity will upset dealings and transactions with *expectant*

(x) 3 J. & B. 21.
(y) Sto. 230, 231.
(z) Ibid. 239.
(a) Ibid. 240-242.

heirs, remaindermen, and reversioners, whenever any inequality appears, or any undue advantage has been taken of such parties' position; and it strongly discountenances all sales of expectant interests by such parties, not only because of the opportunity they afford of taking undue advantage of an expectant while in distressed circumstances, but also because they frequently disappoint the intentions of the party from whom property was expected, and encourage young men to hide their difficulties at home, shake off their father's authority, and feed their extravagances, and, therefore, such sales will be set aside, without the purchaser can show that a fair market price, calculated with reference to circumstances at the time of sale, and not with reference to the event, was given,(*a*) [*48] *or that there was a *bonâ fide* purchase at a public sale, fairly and properly conducted,(*b*) or, that the sale was fully made known to and approved of by the father, or others standing *in loco parentis,* who had the means of obviating the necessity of such a sale, and the knowledge of such persons without their approval(*c*) and ability to relieve the expectant seems insufficient, for although he would not then be deprived of the advice of one in whom he could confide, yet he would still be under the pressure of difficulties, which might well induce such approval towards a transaction which appears unavoidable, however unconscientious the terms. If, however, the expectant, after being fully relieved from his difficulties, deliberately, and on full information, confirms the transaction or does anything injuriously affecting the other's rights or property, he will not be permitted to repudiate the transaction;(*d*) and, when such a contract is set aside, the person relieved will have to repay what has been advanced, with the value of all improvements and interests thereon; but compound interest will not be allowed, although costs are sometimes given.(*e*) Sales by tradesmen and others to expectants at *exorbitant* sums, or under circumstances which show the presence of undue influence, imposition, or connivance at profuse expenditure, unsuited to their position or wealth, and unknown to those *in loco parentis,* will be relieved against, and only a proper sum allowed.(*f*)

On like grounds post-obit bonds, and other securities of a similar nature, are set aside when made by expectants.(*g*) A post-obit bond is a bond given, on the receipt of a sum of money, to secure the payment by the obligor, on the death of another, of a sum exceeding that advanced and legal interest thereon. There are two kinds, first, where the payment depends on a contingency, as if the borrower shall survive another; and, second, where the payment is certain, but the time uncertain, as [*49] that it shall be made as soon as *another dies. In the first instance, as it is uncertain whether or not the lender will ever get back his money, they cannot be impeached on the ground of usury, and are generally valid;(*h*) unless accompanied by some fraudulent circumstances, or the lender is protected by an insurance on the life of the person on whom the contingency depends, of which the borrower bears

(*a*) S. V. & P. 315; Sto. 334.
(*b*) Sto. 338.
(*c*) S. V. & P. 316.
(*d*) Sto. 345, 346.
(*e*) Sto. 326; S. V. & P. 317.
(*f*) Sto. 348.
(*g*) Ibid. 342.
(*h*) 3 J. & B. 424

any part of the expense, in which case the court will generally relieve on payment of the amount advanced with 5*l.* per cent. interest and costs; with respect to the second class of these bonds, although all the circumstances attending them will be rigorously investigated, they are not necessarily bad, without they are grossly unequal, or have been obtained from persons in very necessitous circumstances, or have been accompanied with imposition or other fraud; and, accordingly, an agreement to pay double the amount of the sum advanced on another's death has been supported;(*i*) but if they are not perfectly fair, they will be relieved against, and even their sale at a public auction will not necessarily give them validity.(*j*)

2nd. Common sailors, in consequence of their great improvidence, generosity and credulity, are always indulgently considered in this court, and are protected, and treated in the same light as young expectants, and contracts respecting their prize money or wages are relieved against whenever any inequality appears, or any undue advantage has been taken.(*k*)

3rd. Persons who are at the time of any transaction in very necessitous circumstances, are also frequently looked upon by equity in a similar light, and in dealing with them, strict faith, openness, and justice should be adopted, and no undue advantage taken of their position.

II. With respect to the second class of constructive frauds, it may be laid down as a general rule, that whenever a person has a reasonable confidence reposed in him, or possesses any peculiar influence over another by reason of any confidential *connection, and enters into any transaction with the person so situated, equity, in order as far as [*50] possible to prevent any fraud which may occur from the frailty of human nature, and from the dangerous temptation thus arising from using his influence and intimate knowledge of the circumstances for his own benefit at the other's expense, and relying on the truth of the maxim *emptor emit quam minimo potest, venditor vendit quam maximo*, watches over such transactions with the greatest jealously, and sometimes sets them aside, especially if the person in the fiduciary situation has at the others expense taken advantage of such his position; and the court will never permit the retention of such advantage, however unimpeachable the transaction would have been, if no such confidence had been reposed, or no such fiduciary situation had existed.(*l*)

1st. Thus contracts and conveyances whereby benefits are secured by *children* to their *parents*, although not *primâ facie* void, will carefully and rigorously be investigated, and if not reasonable in themselves, and entered into with good faith, will be upset, unless third persons have acquired an interest under them.(*m*)

2nd. Dealings and transactions also between *guardians* and *wards* during the existence of the guardianship, are in equity not considered binding, even when they have happened after the minority has terminated, if the intermediate period is short, especially where all the duties of the office have not ceased, or where the property continues in some way under

(*i*) 3 J. & B. 426. (*j*) Sto. 347. (*k*) Ibid. 322.
(*l*) Ibid. 308 et seq. (*m*) Ibid. 310.

the guardian's control, without the circumstances show the fullest deliberation on the ward's part, and the most abundant good faith (*uberima fides*) in the guardian.(*n*)

3rd. The same principles are likewise applicable to *trustees*, executors and administrators, and persons standing in the position of *quasi* guardians, or confidential advisers, or in other confidential situations: and, as a general rule, no persons standing in a fiduciary situation, whether trustees, exe-
[*51] cutors or others, will be allowed under any circumstances to *derive an advantage from the way in which they transact the business of their office; and the like doctrine applies to all in like situations, as assignees and solicitors of a bankrupt's or insolvent's estate; nor can an arbitrator purchase up claims on which he has to adjudicate; if, however, the guardianship or other office has entirely ended, and a full and a fair settlement of all transactions growing thereout has been made, and a sufficient time has intervened to enable the ward or other *cestui que trust* to feel completely independent, there is no objection even to a bounty being conferred by the latter.

4th. *Solicitors and attorneys* also, if they contract or deal with their clients, although the transactions are not necessarily invalid, must show the perfect fairness thereof; as soon however as the relation of attorney and client has completely ceased, or they have, as the expression is, put themselves at arms-length, by calling in a third party, their contracts are looked upon in the light of common ones.(*o*)

5th. The same rules also apply to *medical advisers* and their patients, and it seems also to clergymen and others imparting religious instruction and those that place confidence in them, and also to other persons standing in like confidential situations.(*p*)

6th. And also in all transactions between *agents* and their principals, the utmost good faith is required,(*q*) and therefore agents are not permitted to conceal any facts within their knowledge, which might influence the principal's judgment as to price, value, or otherwise; nor is the agent permitted to reap any advantage by becoming secret vendor or purchaser of property respecting which he is employed by his principal, or make any further profit than what has been agreed upon between them, but must account for all profits to his principal; nor can a partner take advantage of the knowledge he has as such partner, in purchasing his co-partner's share.(*r*)

7th. And it may be laid down as a general proposition, that trustees
[*52] (unless merely nominal, as trustees to bar dower or *preserve contingent remainders,) executors, administrators, agents, commissioners and assignees of bankrupts or insolvents, auctioneers, creditors who have been consulted on the sale, solicitors, counsel and others, who, by being employed or concerned in the affairs of another have acquired a knowledge of his property, are generally incapable of purchasing such property(*s*) as long as the relationship lasts; and that such purchases, without being contaminated with actual fraud, will be set aside on the application of the *cestui que trust*, although the trustee him-

(*n*) Sto. 317. (*o*) Ibid. 311. (*p*) Ibid. 314; 7 Sim. 546.
(*q*) Sto. 315. (*r*) 5 J. & B. 428. (*s*) S. V. & P. 886 et seq.

self cannot take advantage of such rule in order to get rid of a bad bargain ;(*t*) and it apparently makes no difference whether the person is trustee for adults or infants, or even if the sale is by public auction, or by the master under a decree for sale.(*u*) It must not, however, be understood that a trustee cannot buy from his *cestui que trust:* the rule is, that he cannot buy from himself, or get all the information that is useful to him, and then discharge himself from his office and buy the property ; where, therefore, the fiduciary relationship is completely ended, the trustee may purchase, although the court watches carefully such transactions, and will not support them unless it clearly appears that the sale was fair, and after the trustee had, by the vendor's consent, freely given after a full information, completely shaken off his confidential character ;(*x*) and when a trustee purchases in the name of another, that circumstance, as it shows a wish of concealment, will generally be sufficient to enable the court to set aside the sale ; however, an execution creditor can buy property sold under an execution. Nor is the rule applied to a mortgagee purchasing the property in mortgage, although it seems a mortgagee cannot for his own benefit buy property under a power of sale ; nor, generally, where he sells under an order in bankruptcy, without leave is given,(*y*) for in these cases he would be both buyer and seller ; but the fact that the purchaser is nearly related or *intimately connected with the trustee, as that he is the son, or father, or [*53] partner, is not, without some real fraud, sufficient to upset the sale.(*z*) And it may be here mentioned, that a sale by trustees to a tenant for life, under a power in a settlement to sell without such tenant's consent, if fair and reasonable, is good;(*a*) so, if there is no concealment, a steward or other person may take a lease from his employer,(*b*) and a trustee may also deal with his *cestui que trust* in matters over which such trusteeship gives him no advantage over the other, or respecting property of which he is not trustee, provided he acts openly and honestly ; but the only mode by which a trustee for a person not *sui juris* can safely purchase the trust estate, is by obtaining leave of the court for such purpose, and where no cause or matter is pending in which application for leave can be made, a bill can be filed for such purpose provided it is fit that the estate should be sold, and the trustee is ready to give more than any one else ;(*c*) but, without the consent of the *cestui que trust*, the court will not generally allow a trustee to give up his office and bid for the property ;(*d*) and the court has refused to allow assignees of a bankrupt to bid at a sale.(*e*)

If a decree is made that a sale to a person in the position of a trustee is invalid, such trustee, if he has not sold the estate to a *bonâ fide* purchaser, will be called upon to reconvey it, but will, nevertheless, be entitled to receive back his purchase-money, and all moneys which he has laid out in permanent improvements and alterations which have a tendency to bring the estate to a better sale, and interest from the times

(*t*) 5 J. & B. 419.
(*u*) S. V. & P. 891.
(*x*) Ibid. 895.
(*y*) Ibid. 889.
(*z*) Ibid. 892.
(*a*) Ibid. 893.
(*b*) 5 J. & B. 428.
(*c*) S. V. & P. 896.
(*d*) Ibid. 894.
(*e*) 5 J. & B. 412.

they were respectively actually disbursed; and he must account for all profits from rents or otherwise, and for all deteriorations, with interest thereon: or the *cestui que trust*, if he wishes, will generally, in lieu of taking back the estate, be allowed to try the experiment of another sale.(*f*) Generally, in the above cases, any interest which is payable is [*54] calculated at 4 per *cent., and the trustee is made to pay the costs. Transactions, however, between parties in the above situations not being *mala in se*, but only *mala prohibita*, may be confirmed by the injured party, provided he has ceased to be under control, and is *sui juris;* and long acquiescence on his part, after he has become cognizant of the whole circumstances, will generally be considered sufficient to estop him from claiming any relief.(*g*)

8th. Between *debtor*, *creditor* and *surety* also, entire good faith is required; and therefore, if a creditor does anything affecting the surety, or omits doing any act of duty when required by the surety, the latter may set up such conduct as a defence to any proceedings brought against him, if not at law, at least in equity;(*h*) thus, if any of the securities are lost by the neglect of the creditor, as by omitting to register a ship,(*i*) or the creditor releases any remedy he has in any collateral security without the surety consents, the latter will be released; and it makes no difference whether such security was or not known to the surety at the time he became such.(*k*) And in the case of a note or bill of exchange, if the holder releases, compounds with, or gives time to the promisor or acceptor, the several indorsers will generally be discharged;(*l*) but a release to an indorser does not release the prior indorsers, without it was known to the holder that they were only sureties.(*m*) And if the creditor enters into a binding contract, giving the debtor further time, the surety will be discharged; and so any concealment or other matter which varies the liability of the surety, will be considered a fraud and operate as a discharge.(*n*) Mere delay, however, on the part of the creditor, without some other equity, will not be sufficient to discharge the surety; but the sureties are entitled, after a debt becomes due, to apply to equity to compel the debtor to exonerate them by paying the debt,(*o*) or to compel the creditor to relieve them or proceed against the debtor. [*55] Nor will the *taking of further security, if the remedy under the former security is not suspended, be a discharge to the surety, nor the signing of a bankrupt's certificate; nor will giving time to the debtor, provided the creditor's remedies against the surety are expressly reserved, and the position of the surety is not thereby materially changed.(*p*) It may here be mentioned, that a surety, by taking an assignment of the debt to a trustee for himself, cannot recover more from his principal than he has paid.(*q*)

III. Relief will further be granted on the ground of constructive fraud in cases of acts or omissions, which, though they may have been considered quite justifiable or excusable, or may have arisen from mere

(*f*) S. V. & P. 897. (*g*) Ibid. 900. (*h*) Sto. 324, 325.
(*i*) 3 J. & B. 303. (*k*) Ibid. 294. (*l*) Ibid. 307.
(*m*) Ibid. 309. (*n*) Ibid. 298, 311. (*o*) Ibid. 303.
(*p*) Ibid. 303; 20 L. J. (Eq.) 314. (*q*) 5 J. & B. 295.

neglect, unconnected with any selfish or evil design, operate virtually as frauds upon others.

1st. Therefore where a person, by some act, statement or omission, knowingly produces a false impression on another, which misleads and injures him, the person who so misleads, even though unintentionally and without any chance of benefiting himself, must, even though a married woman, compensate for the injury or bear the loss; for when rightly considered, such conduct, though arising from mere negligence or inattention, is plainly contrary to moral duty and good faith.(*r*) Thus, where a person, knowing himself to be the owner of property, permits another to dispose of it as his own to another, who purchases under such impression, the real owner will not be allowed to upset such purchase;(*s*) and where a person, aware of the existence of an instrument under which he might reasonably have supposed that he took some interest, neglects to inquire, and encourages others to deal with another respecting property which he takes thereunder, he will be bound by the transaction;(*t*) and so if a first mortgagee conceals or denies his mortgage, he will be postponed to the other mortgagees.(*u*) And although sales from executors of a testator's personal *property are ordinarily valid, [*56] yet whenever the purchaser knows that the property is being improperly converted, or the purchase-money unlawfully applied, such sales will be set aside;(*x*) and where a mortgage or conveyance is taken with notice of another's title, either legal or equitable, the same will be postponed and made subject to such title (except in cases within the 27 Eliz. c. 4, and that before the abolishment of attendant terms by 8 & 9 Vict. c. 112, one who purchased with notice of dower could obtain protection by the getting in a term or other outstanding legal estate;) and this is the same although the property lies in a register county and has not been properly registered, for the registry acts were meant only to protect from secret transactions;(*y*) and it is not necessary that there should be actual notice, for anything which is sufficient to put a person on inquiry (that is, has a reasonable certainty as to time, place, circumstances and persons,) is considered in equity as sufficient notice to bind him;(*z*) and, accordingly, a purchaser is presumed to know how the party from whom he buys derives his power as executor, trustee, appointee, or otherwise; and notice of a lease will generally be deemed notice of its contents; but knowledge of the mere registration of an instrument is not deemed constructive notice to subsequent purchasers of collateral effects, such as defeating a right of tacking; and the notice is considered sufficient if it is brought home to the agent, attorney or counsel in the same transaction, or one immediately preceding; and therefore, where a person acts as solicitor both for the vendor and purchaser, anything which is known to such person as the solicitor for the vendor is considered as known to the purchaser,(*a*) though, where a mortgagor acts as solicitor for the mortgagee, it is not considered that the mortgagee has notice of a prior loan which the solicitor has himself obtained on the

(*r*) Sto. 384, 385. (*s*) Ibid. 385. (*t*) Ibid. 387.
(*u*) Ibid. 390. (*x*) Ibid. 422. (*y*) Ibid. 397.
(*z*) Ibid. 399. (*a*) Ibid. 403.

property.(*b*) And he who purchases during the pendency of a suit is [*57] generally bound by the decree that may be made against his vendor, *for otherwise alienations made during a suit might entirely defeat its purpose, and there would be no end to litigation; but as a *lis pendens* is considered only a general notice of an equity, no person other than parties or privies will be presumed to have notice, unless he has specific notice of the title in dispute;(*c*) a person, however, who has notice of another's claim, may nevertheless purchase from one who has a title unaffected by any notice; and if he has previously purchased with notice of another's claim, may protect himself (except from dower) by purchasing a *bonâ fide* title of one unaffected with notice, for otherwise the holder of the good title could not enjoy the full benefit of it; nor will a person who purchases without notice from one who previously purchased with notice be prejudiced, for otherwise no one would be secure in any purchase.(*d*)

2nd. By the statute of 27 Eliz. c. 4, and the decisions thereon, it seems that all prior conveyances of lands, tenements and hereditaments (not personal estate,)(*e*) unless supported by a valuable consideration are void as against subsequent purchasers from the maker of such prior conveyances, whether with or without notice; but not as against subsequent purchasers from those claiming under such maker, unless actually fraudulent and not only voluntary.(*f*) Voluntary conveyances, however, are binding between the parties themselves, although by the construction which has been put on the statute, the donor, at any time before the donee has parted with the property for a valuable consideration, can defeat such gift by a subsequent sale for value, even to a person who has notice. If, however, the voluntary grantee has already conveyed away for value, the purchaser from the donor can have no relief, and equity will not interfere as between two voluntary conveyances, where both are *bonâ fide*, nor even enforce a voluntary agreement for a conveyance, notwithstanding there is a meritorious consideration, although it will carry [*58] out one *which has been made: so that where stock had been transferred under a voluntary agreement, although equity would not have enforced the transfer if it had not been made, yet it enforced the rights growing thereout, there being no intervening equity.(*g*)

3rd. Both by the common law and the statute of 13 Eliz. c. 5, conveyances, either of real or personal estate liable to be taken in execution by persons who at the time, or immediately afterwards, are indebted to such an amount that sufficient is not left to pay their debts, will be fraudulent and void against the creditors, as far as is necessary to satisfy them, unless such conveyances are for a valuable consideration, and *bonâ fide* to one who has no notice of any fraudulent intent.(*h*) The mere fact, however, of a conveyance being voluntary would not necessarily, without there was some actual fraudulent intention, make it void against any, except the creditors at the time, even if it was an act of bankruptcy;(*i*) but it is

(*b*) 21 L. J. 69.
(*c*) Sto. 405-407.
(*d*) Ibid. 409, 410.
(*e*) 2 My & K. 512.
(*f*) 20 L. J. (Q. B.) 177; Sug. V. & P. 925.
(*g*) Sto. 425-436.
(*h*) 5 J. & B. 237; Sto. 350, et seq.
(*i*) 17 L. J. (Exch.) 234.

unnecessary to prove that the debtor was insolvent, proof that he was largely indebted being sufficient.(*k*) Trust deeds of all a debtor's property for the benefit of the creditors, though acts of bankruptcy, are not deemed void under this statute, if *bonâ fide* and for the benefit of all, and not encumbered with trusts for the special carrying on of the debtor's trade, except for the purpose of winding it up.(*l*) Marriage being a valuable consideration, ante-nuptial settlements are generally valid; but if from the contents or aliunde it can be proved that the settlement was with an intent to defeat creditors, and in contemplation of bankruptcy or insolvency, and it can be inferred that the wife was privy to such fraud, it will be set aside.(*m*) If the conveyance was of only part of the debtor's property, the presumption of fraud from the person being indebted may perhaps be rebutted,(*n*) and the conveyance held good;(*o*) but if it contains a power of revocation, it would most probably [*59] *be set aside; and the fact of keeping possession of the property after the execution of the deed, or of keeping the deed itself secret, is strong evidence of fraud; and a conveyance is even void although the grantor is not indebted, if it is made with a fraudulent intent.(*p*) The statute did not formerly apply to copyholds, nor, as it seems, to stock and other choses in action, and other property which could not be taken in execution, without property not liable to be taken in execution had been obtained by the conversion, with intent to defraud creditors of other property; but as copyholds, and nearly all property, are now liable to be taken in execution, or otherwise applied in payment of debts by 1 & 2 Vict. c. 110, the statute would be now held to apply to all such property.(*q*)

4th. As the Statute of *Frauds* was designed as a protection against fraud, the court will not allow it to be set up as a protection or support of fraud: and therefore, where, from fraudulent circumstances, a contract has not been reduced into writing, as it ought to have been, it will nevertheless be enforced against him who is guilty of the fraud, and he will be prevented from sheltering himself under the provisions of the statute.(*r*)

5th. Marriage, and other *contracts* which are made *clandestinely*, and designed to impose on parents, or others standing in *loco parentis*, or in some other peculiar relation to the parties, so as to defeat their intentions in the settlement or disposition of their property, will be upset, or modelled so as not to defeat such intentions.(*s*) Thus a security given clandestinely by one who has expectations from another, that on such person's death he will marry the obligee or pay a certain sum, has been relieved against on the ground of fraud on the deceased, and also on the ground of public policy, that such transactions encourage disobedience to parents.

6th. So where persons, after performing acts required on a treaty for marriage, render them nugatory by *secret agreements*, or otherwise dero-

(*k*) 18 L. J. (Eq.) 9.
(*l*) 5 L. J. (K. B.) 191; 20 L. J. (Q. B.) 217.
(*m*) 15 L. T. 189.
(*n*) Sto. 365.
(*o*) 8 M. & W. 410.
(*p*) Sto. 356-370.
(*q*) 5 J. & B. 28, 75, 237; 26 L. J. 105.
(*r*) Sto. 330.
(*s*) Ibid. 275.

[*60] gate from those acts, equity will relieve; as *where a brother, on the father's declining to consent to a marriage because the intended husband was indebted, obtained his consent by giving a bond for such debts, and the husband secretly gave a counter-bond to indemnify the brother, and where a brother, on his sister's marriage, privately lent her money to make her fortune appear as large as was required, and the sister secretly gave a bond to secure it, the bonds were set aside as being, in the first case a fraud on the parent, and in the other, on the husband; and so if a parent, on the marriage of his child, agrees to leave on his death an equal share of his personal estate to such child, he cannot afterwards transfer a portion thereof to another child and retain the income thereof for his life; he may, however, make a *bonâ fide* gift to another child, for the agreement cannot deprive him of any rightful disposition of his property.(*t*)

7th. So also equity will not permit *acts* secretly done by a woman *in contravention* of her intended husband's *marital rights* or just expectations, to stand; and therefore a woman, in contemplation of marriage, and without her intended husband's privity, cannot convey her property to her separate use, or in favour of those for whom she is under no moral obligation to provide; she, however, would be allowed to make a *bonâ fide* and reasonable provision for her children by a former marriage.(*u*)

8th. Agreements between persons *not* to *overbid* one another at an auction, especially where the same is directed or required by law, are void, both because of the injury which results to the vendor, and also on the ground of public policy, as tending to prejudice the character and value of auctions; and so, although one puffer, or a reserve bidding, is allowable, to prevent the property selling at an undervalue, except when it is stated in writing that the sale is without reserve; yet if underbidders or puffers are employed to enhance the price, and other bidders are thereby misled, the sale will be void, on the ground, not only of injury to the purchaser, but also of public policy.(*x*)

[*61] 9th. So, likewise, if *creditors*, who, by becoming parties to a composition deed, have, or may have been the means of leading others to join therein, have previously entered into a *secret arrangement* with the debtor for securing to themselves greater advantage than the composition deed warrants, such secret arrangement will be held void even against the assenting debtor, his sureties, and friends, and money paid thereunder may be recovered back, both on the ground of the fraud on the other creditors, and of public policy.(*y*)

IV. Besides those transactions which have been enumerated under the last head as avoidable on the ground of the fraud on the individual and of public policy, there are numerous instances in which the relief is principally on the latter ground, for there are many transactions which, although they may not operate as frauds upon individuals, would in a legal sense, if generally permitted, be injurious to or subversive of the public interests.(*z*) Contracts and conditions, which are considered contrary to law, are, 1st, To do something *malum in se* or *malum prohibi-*

(*t*) Sto. 267, 271, 282. (*u*) Ibid. 273. (*x*) Ibid. 293; S. V. & P. 16.
(*y*) Sto. 349-379. (*z*) Ibid. 260.

tum; 2nd, To omit the performance of some duty; 3rd, To encourage such acts or omissions. And such contracts and conditions will be considered void, except where only part is illegal, and such part can be separated from the rest, in which case the whole will not be void, but only the illegal part; and when an advantage is sought to be taken on account of illegality,(*a*) it must be shown, as it will not, any more than fraud, be presumed, for *omnia rité presumuntur;* but in these cases the maxim, "He who comes into equity must come with clean hands," does not apply; for the relief is not only given on account of the injury to the individual, but also in order that nothing may be successfully done contrary to public policy.

1st. Thus bonds and other agreements intended for the reward of those who attempt to *influence a testator* in the disposition of his property, are void on the ground of public *policy, as tending to deceive and injure others and encourage artifices and improper attempts [*62] to control the exercise of their free judgments; but an agreement among heirs, or next of kin, or other relations, to share the testator's property equally between them, however the will may dispose of it, is good, for such an agreement is generally for the suppression of fraud and undue influence.(*b*)

2nd. *Marriage brokage contracts,* or agreements whereby one engages to remunerate another on procuring or promoting a specified or advantageous marriage, are so totally void both at law and in equity, that they cannot even be confirmed, in consequence of their tendency to introduce matches which are ill advised and without mutual affection, and the disinterested counsel and advice of relations of friends, and therefore detrimental to the welfare of society;(*c*) and even a bond, though voluntarily given after marriage as a reward for assisting in an elopement and marriage with the consent of friends, will be set aside, and money paid on such contracts may, whether the marriage was equal or not, be recovered back in equity; and secret contracts with parents, guardians, or others standing in a position of influence, whereby they are to receive a remuneration for the promotion of a marriage or for giving their consent, are held void.(*d*)

3rd. *Contracts and conditions* also, which are expressly in *restraint of marriage* altogether, or may virtually operate as such, as that a woman shall not marry except to a particular individual, without such person is also obliged to marry the obligor,(*e*) or shall not marry one who has not 500*l.* a year, or till fifty years of age, are void, as tending to immorality; but if the restraint is only partial, as that the party shall not marry a particular individual or class of individuals (if such would not virtually prevent marriage,) as that an English woman shall not marry a Scotchman,(*f*) or that the person shall not marry during infancy, or without certain practicable *ceremonies, or without the consent of parents, trustees or other specified persons, it is good. [*63] With respect to widows, however, a condition that on marrying again

(*a*) 3 J. & B. 364; B. L. M. 580.
(*b*) Sto. 265.
(*c*) Ads. Cont. 569.
(*d*) Sto. 260-266.
(*e*) 3 J. & B. 383.
(*f*) 9 East, 170.

she shall forfeit property which has been given her, is good on the ground amongst others that her second marriage may be detrimental to her children if she has any, although it seems not to matter whether she has children or not; but nevertheless, a bond given by a widow that she will forfeit a sum of money on marrying again would be relieved against.(*g*) It should be here mentioned, that although a clause reducing or determining an annuity or other benefit on marriage is void; a gift, either of realty or personalty, *until* marriage is good, and necessarily ceases on the marriage. As to personality, a condition, although only partially restraining marriage, if subsequent, will only be considered *in terrorem*, without there is a limitation over, and even in some cases though precedent;(*h*) but in cases of real estate and charges thereon, the law is more stringent, and on the forbidden marriage happening, the estate will determine.(*i*) On the same grounds, contracts or conditions for the purpose of inducing married persons to live separate are void;(*j*) and so as our law encourages filial duty, contracts or conditions restraining parents from having the proper control of their children are bad, without such parents are of immoral character, or the children would thus be greatly benefited without detriment to their parents.

4th. So *contracts* and conditions in general *restraint of trade* are bad, as tending to discourage industry and just competition; but for a valuable consideration a person can be restrained from carrying on his trade in a particular locality or with specified persons, or for a reasonably limited time; thus a covenant by a surgeon on selling his business that he would not practise within two and-a-half miles or live within that distance during his life,(*k*) and an agreement by an *assistant that [*64] he would not practise within ten miles for fourteen years, were held good;(*l*) and a restraint over one hundred and fifty miles has been held good, respecting an attorney who sold his business; and so has a condition to serve for life a particular person and no other;(*m*) and a person may sell a secret in his business and restrict himself from its use.(*n*)

5th. With a few exceptions, all contracts for the *purchasing* or procuring of *public offices*, and also those which encourage *maintenance* or *champerty*, are deemed void on the ground of public policy. The points arising on these subjects are more fully treated under the head of "Specific Performance."

6th. Agreements also for the suppression or compromise of criminal proceedings are also considered void, as tending to diminish the certainty of punishment, and otherwise weaken the salutary effects of the criminal code; and so are all bonds and securities which are founded on any corrupt or immoral consideration, namely, any thing which is repugnant or prejudicial to the moral or municipal law, for *ex nudo pacto, et turpa causa, ex dolo malo et ex maleficio non oritur actio sive contractus.* Thus agreements or securities given as a price for future illicit intercourse (*præmium pudoris,*) or for the commission of a public crime, or

(*g*) 3 J. & B. 383. (*h*) Sto. 287. (*i*) 1 J. W. 836.
(*j*) See *infra*, "Separation." (*k*) 19 L. J. (Exch.) 132.
(*l*) 5 T. R. 118. (*m*) 3 J. & B. 460. (*n*) Sto. 292.

for the violation of a public law, or for the omission of a public duty, are deemed incapable of confirmation or enforcement;(o) but though the Court of Chancery will upset a deed really made in consideration of future cohabitation, where no cohabitation happens thereunder,(p) it will not interfere either for relief or discovery where the person applying has participated in the intended immorality.(q) Equity, it seems, will not relieve against a security given for past cohabitation, although such may not be a sufficient consideration to support an action of assumpsit at law.(r)

*CHAPTER III. [*65]

ACCIDENT AND MISTAKE.

THIS branch of equity has been recognized from an early period, and from the inability of the courts of law in the majority of cases to afford relief has been exercised most beneficially. *Accidents*, respecting which equity relieves, may be defined as unforeseen occurrences occasioning injury, but not attributable either to the negligence or the misconduct of the injured party, and irremediable on the ground of mistake, fraud, or wrongful conduct.(a) *Mistakes*, respecting which equity assists, are unintentional acts, omissions, or errors arising from ignorance, forgetfulness, inadvertency, or mental incapacity, surprise, misplaced confidence or imposition, and insufficient to give a title to relief on the ground of fraud.(b)

The chief reason why accidents are remediable, is that, according to our law, "*Actus Dei aut legis nemini facit injuriam*," it being unreasonable, that what is inevitable by the act of God or the law, and no industry can avoid, nor policy prevent, should prejudice one who has not been guilty of laches; therefore, if by act of God or the legislature, something happens which is detrimental to another, equity, in the absence of a counteracting equity or special contract, relieves; thus, if by act of parliament the interest of public stock, directed by will to be set apart to answer an annuity, is reduced, such reduction is considered an accident, and relief is afforded by decreeing the deficiency to be made up against the residuary legatee, or, in some cases, out of the capital of the fund.(c)

Accidents, also, which are occasioned by the acts of others, and prove detrimental to innocent parties, are also remediable *on the ground that persons are in justice bound to remedy those evils which their acts, though innocent in themselves, have caused. [*66]

There are, however, many accidents and mistakes in which equity will refuse to give relief, on the ground that they have always been fully

(o) Sto. 296. (p) 18 L. J. 350. (q) Ibid. 445.
(r) 3 J. & B. 385; 15 L. J. (Q. B.) 141. (a) Sto. 78, 79.
(b) Ibid. 110. (c) Ibid. 93; B. L. M. 171.

remediable at law, and also many others in which relief is unattainable both at law and in equity; thus no relief will be afforded where the accident or mistake arose from the gross negligence or fault of the complaining party; nor where a person has expressly and absolutely *contracted* or covenanted to do a particular thing, and is prevented by accident or mistake from fulfilling his engagement or from deriving the full benefit of the contract; for as he might have made proper exceptions, it will be presumed that no exception was intended; so that if a tenant specially agrees to keep the demised premises in repair, he must do so notwithstanding an accident whereby they are destroyed or injured, and in case of destruction by fire or otherwise, as by violent floods, he must rebuild them, while, if there was no express agreement to repair or rebuild, he need not;(*d*) so, where there is an agreement to pay rent during the term, without proper exceptions, it continues payable until the expiration of the term, although the premises are accidentally burnt down or rendered uninhabitable, and even where there is only an implied agreement to pay rent, it seems he must do so until the tenancy is properly determined, and the fact that, upon the destruction of the premises by fire, the lessor received the full value from an insurance office does not alter the liability of the tenant, or constrain the lessor to reinstate the premises without it is thus agreed; perhaps, however, in equity, a tenant for a term would, upon notice to his landlord to rebuild, and a refusal or neglect to do so within a reasonable time, be relieved, if there was no express agreement to pay rent for the term.(*e*)

When, after a contract for purchase of property a loss occurs, such [*67] must generally fall on the purchaser, he being *considered in equity as the owner by reason of the contract, and entitled as such to all gains and liable to all losses; when a sale takes place under the court, he is treated as owner as soon as the report for sale is confirmed absolutely.(*f*)

Relief is never granted to one whose equitable right to assistance is only equal to that of the person against whom it is sought, although such first may be a great loser by the accident or mistake, for that would be contrary to the maxim, *In æquali æquitate melior est conditio defendentis*, thus relief is not afforded against a *bonâ fide* purchaser for value without notice, nor will it be granted to legatees or devisees under a will defectively executed; for they being mere volunteers, have not even as much equity as the heir at law or next of kin, for *fortior et æquior est dispositio legis quàm hominis*, and, if there was an equal equity, the latter would not be deprived of the legal right, for, the equities being equal, the law prevails.(*g*)

Where, however, no adequate relief could or can be afforded at law, nor due care taken of the rights of all interested, and the injured person is blameless, and has a conscientious title to relief, not opposed by another's equal equity, equity will, if it can without derogating from any positive agreement, relieve as far as possible against the consequences arising from any accident or mistake;(*h*) thus equity can compel a dis-

(*d*) Ann. c. 31, 46. (*e*) Sto. 101, 102; W. L. & T. 417.
(*f*) S. V. & P. 71, 331. (*g*) Sto. 108. (*h*) Ibid. 109.

covery of lost, destroyed and suppressed documents, and will, by compelling such discovery or otherwise as the particular circumstances of the case require, interfere in favour of one, who, from long possession of property or user of a right, may fairly be presumed to be entitled, but is prevented by some accident from giving proof thereof;(*i*) and where it is necessary to apply to equity for discovery, the court can and will generally allow the suit to proceed, and therein grant the relief that is necessary and consequent on such discovery, so that the complainant may have complete relief without the necessity of proceeding at law on the evidence *thus obtained; such relief, however, is only given as incident to the discovery, and, therefore, when sought, the bill, besides containing an offer of indemnity, if the nature of the case seems to require one, must be accompanied with an affidavit of the facts in consequence of which the discovery is sought, and such facts must be satisfactorily proved at the hearing, if not admitted, which, if discovery is merely sought, is not necessary; for equity is the proper court to obtain discovery, and no one would think of filing a mere bill of discovery unless it were requisite.(*k*) [*68]

Where a deed relating to property has been either destroyed or concealed by the defendant, but which cannot be ascertained, equity will decree, although a court of law cannot, that the plaintiff shall enjoy the property until the defendant produces the deed, or admits its destruction;(*l*) for it is reasonable to presume that it would neither have been destroyed or concealed without it militated against the interest of the defendant, and therefore it is that *omnia præsumuntur contra spoliatorem;* and so where a party in possession seeks a discovery in respect of a lost deed, and to be established in his possession, equity assists, there being no remedy at law; and if a bond has been lost, a bill for discovery and payment can be maintained in equity; for originally there was no relief at law, and although where evidence of the bond can be given, the courts of law will now relieve, equity is still the best jurisdiction, not only because of the difficulty of proof, but also of the propriety in many cases of an indemnity against the lost bond being given to the defendant on payment.(*m*) In cases also of the loss of negotiable instruments, equity will generally give relief, and order payment on a proper indemnity being given, for as such instruments are transferable at law, payment cannot be compelled at law without they are delivered up as vouchers;(*n*) where, however, money is wished to be recovered on lost unnegotiable instruments and other unsealed securities, the proper *forum is at law, as no profert was ever necessary or oyer allowed thereof, and equity will not in such cases entertain a bill for relief, unless there is an offer of indemnity in the bill, or something particular constituting a ground for equitable relief.(*p*) [*69]

If by an accident, which the executor could not prevent, part of a testator's assets have been lost, equity will prevent the creditors from suing the executors, and making them liable for the loss, and even in

(*i*) Sto. 97. (*k*) Mit. 54; Sto. 82-88. (*l*) Sto. 84.
(*m*) Ibid. 82; 24 L. J. 623. (*n*) 7 Barn. & C. 90; 11 Jur. 750.
(*p*) Sto. 85, 86.

some cases will make the creditors or legatees refund, if they have been paid under a mistake as to the amount of the assets.(q)

Where a mere power, which is created by an ordinary assurance, is *defectively* executed in something which is *not* of the very *essence* of the power, in favour of a wife, a legitimate child, a charity, creditors, or those who have paid a valuable consideration, as purchasers, and there is no countervailing equal equity, this court will relieve, not by deciding that the power was well executed, but that such things shall be done which will enable the intended appointee to enjoy the property; but no assistance will be given to an appointor who attempts to appoint to himself, or to the husband or grandchild, or other relation of the appointor, or to strangers, without there is some valuable consideration;(r) nor will equity relieve where the regulations prescribed by statute have been omitted, at least where they constitute the apparent policy and object of the enactment, as under the act for the abolition of fines and recoveries, the enrolment or the consent of the persons required by the act, except under very special circumstance; nor will it support an execution by an absolute deed, when a will is pointed out, for a deed is not revocable as a will, and this would be repugnant to the power, but on the other hand a will instead of a deed would be carried into execution.(s)

[*70] Nor will equity interpose in case of the *non-execution* of a *mere power, for that would be depriving the donee of his right of discretion as to whether he will exercise it or not; but where the power is coupled with a trust, relief is afforded, because in such case the donee ought to have exercised it.(t) The mere manifestation of an intention to execute the power, if it clearly appear in writing, is deemed a defective execution, and, therefore, if a person contracts to sell an estate, over which he has a mere power, that will be sufficient, provided there is a proper consideration, and the power is not trammelled with conditions, such as the assent of others, which are of the essence of the power; and it will be enforced against the contractor and all who take after him, without their equities are at least equal to the purchaser's.

Where acts, necessary to the validity and effect of written instruments, have by accident or mistake been omitted, as livery of seisin, surrender of a copyhold, or enrolment of a bargain and sale, or for some other reason, the instrument cannot operate as intended, it will, if possible, and there is a consideration, be held to operate in some other way, so that the intention of the parties may not wholly be defeated, *ut res magis valeat, quam pereat.* Thus a feoffment or other deed, in consideration of natural affection, would be held good as a covenant to stand seised. And where an instrument, founded on a consideration, cannot have any legal effect, equity will treat it as a contract, and decree what is necessary to carry out the intention of the parties.(u)

With respect to conditions, relief is frequently given both as to those which are *precedent* and those which are *subsequent.* Thus, if a legacy is given upon condition that the person marries with the consent of three persons, or to be forfeited on marrying without such consent, and by

(q) Sto. 91. (r) Ibid. 95. (s) See Sugd. on Powers.
(t) Sto. 94-7. (u) Ibid. 166-168; B. L. M. 415; Mit. 116.

death the required consent becomes impossible, the consent of such as can be given is considered sufficient, *actus Dei nemini facit injuriam.*(x) But with respect to real estate, as conditions respecting it are not governed by analogy to the civil law, but *to the common law, and are therefore construed more strictly than those relating to personalty, if the condition was precedent, such estate does not vest till the performance of the condition; but if subsequent, the estate being vested, would not be divested by such a marriage.(y) It is, however, a general rule, that if a contract or condition becomes impossible by the act of God, or of the law, or of the other party, and not by the act of the party himself or a stranger, the performance is excused, for *lex non cogit ad impossibilia;* although damages at law are recoverable for the breach of an express contract to perform what is at the time impossible, yet a condition of that kind is void,(z) and if precedent to the vesting of real estate, prevents the vesting; while if subsequent, or relating to personal estate, it is as if *non scripta,* and has no effect. [*71]

Mistakes are either *in law* or *in fact.* By law is simply meant our own, and not that of other countries, for such must be proved as any other fact that is relied upon. As a general rule, no relief is given either at law or in equity on the ground of a mistake in the law, it being a maxim *ignorantia legis non excusat.*(a) Thus if an obligee release one of two joint obligors under the impression that it will not, as it does, release both and also the sureties, if any, equity will not relieve. This rule, however, is now greatly modified by the courts of equity relieving in all proper cases in which there is mixed up with the mistake in law, any slight matter of fact, or wherever there is any circumstance which gives rise to the presumption that there has been undue influence, misrepresentation, wrongful conduct, or mental incapacity; thus, where a husband gave a bond to his intended wife without the intervention of a trustee, relief was afforded; and so whenever advantage is taken of a person who is unaware of his legal rights, he will be relieved. Whether a mistake is one in law or in fact is frequently a question of difficulty; a mistake, however, as to whether certain lands were gavelkind would be one of fact; while a mistake as to the mode in which lands generally descend would be one of law.

If the mistake is of fact, it may be either mutual or unilateral, and if the latter, either respecting a transaction between parties, or something done alone by the party making it. When mutual, the transaction binds, without there was a mutual surprise, or the mistake was in a material fact, or in believing that the subject-matter existed when it did not, or that something was sold when it was not; as where an estate had, without the knowledge of either, been swept away by a flood previous to the contract, and where a person ignorantly bought his own estate.(b) [*72]

If the mistake was unilateral, relief will not be granted to the person making it, unless the circumstances of the case create a presumption that there was some misrepresentation, imposition, mental imbecility,

(x) Steph. Bl. 291. (y) 8 Taunt. 457. (z) B. L. M. 183.
(a) Sto. 128, 137. (b) Sug. V. & P. 238, 269, 355, 421; Sto. 134, 148.

surprise, or confidence abused; relief, however, will be afforded if such a presumption exist, and the mistake was in a material fact, and not of a doubtful nature, nor one ascertainable by ordinary care or diligence, but one which the other party was under a legal obligation to inform the other respecting.(c) In ordinary cases, the persons contracting, though they must be careful to do nothing which may mislead, need not inform the other party of anything except latent defects and circumstances, and therefore a purchaser is not obliged to inform a vendor that his estate has valuable mines; but where one of the parties is in a position of trust or confidence, as solicitor, trustee, or adviser, he must afford all the information he can. A compromise of doubtful rights, whether the doubt is of law or fact, will be supported if there is no imposition, and all are in a state of mutual ignorance, or are acquainted with the doubts existing in their favour, and family arrangements are more strongly supported than others; where, however, some of the parties are, and the others are not, cognizant of what doubts exist in their favour, the compromise will not be binding, for the very nature of the transac-
[*73] tion requires that all should be on an equality as regards *the ignorance or knowledge of the doubts which exist, and that no undue advantage be taken.(d)

Where a mistake in a written instrument, whether executed or executory, or an omission of an act necessary to give validity to such an instrument, occurs, and the same is clearly proved by admissible and satisfactory evidence, or is admitted by the defendants, equity (except against a person having an equal equity, as a *bonâ fide* purchaser for value without notice,) will rectify the instrument and supply the defect which has occurred. The fact, however, that the final instrument of conveyance or settlement differs from the primary agreement, affords a presumption of an intentional change of purpose, without, from some recital or attendant circumstance, it appears to have been intended to be merely in pursuance of the original agreement.(e) The evidence may be from the instrument itself, or it seems from parol proof, supported by corroborative circumstances, although the general rule of law is, that parol evidence is not admissible to substantially disannul, add to, subtract from, qualify or vary, a written instrument.(f)

Where an instrument is so general in its terms as to release a right or convey property which was not within the contemplation of the bargain, equity will, on the ground of mistake, restrain such instrument so that it may operate only as was intended.(g)

The mistake in a written instrument is sometimes presumable from the nature of the transaction. Thus, where in a bond for the payment of a joint loan the obligors are made only jointly liable, so that at law those that die first are discharged, equity will consider the bond joint and several, and make the representatives of the deceased liable as well as the survivor or survivors. This, however, will not be done as against persons

(c) Sto. 117, 146, 150.
(d) Ibid. 131, 132.
(e) Ibid. 152, 160-165, 694; 18 L. J. 129.
(f) Ibid. 153-158; S. V. & P. 157, 158.
(g) Ibid. 145; 12 L. J. 344.

who were not benefited by the loan, but were only sureties;(*h*) and with respect to marriage articles, words which in a more formal or executed instrument *would be construed as giving an estate tail, will, without the presumption arising from the nature of the transaction is rebutted, be construed as directing a strict settlement, and any settlement which carries out such articles according to the technical effect of the words instead of the intention, will be duly rectified.(*i*) [*74]

When it clearly appears that a bequest or devise has been made or revoked under a mistake of the existing facts, and it is morally certain that otherwise the testator would not have so acted, equity will declare such bequest, devise or revocation to be inoperative, or at least that the parties benefited by the mistake shall be trustees for those who would otherwise have been benefited; and a mistake in the computation of a legacy, or in the name, description or number of the legatees, or in the property bequeathed, will be corrected. The mistake, however, must in general be *apparent* on the face of the will, for parol evidence, except in cases of latent ambiguities and frauds, cannot generally be admitted to vary or control a will.(*k*)

The ground on which election is compelled is in numerous cases that of mistake.

Not only can instruments be rectified, on the ground of mistake, but they can also be altogether set aside on such ground, and will be, if the mistake goes to the whole matter or materially affects it. It is an easier matter totally to avoid an agreement than to vary it, for the Statute of Frauds does not say that a written agreement shall bind, but that an unwritten one shall not.(*l*)

Equity will not interfere in case of a mistake made by a judge, or jury, or an arbitrator appointed by reference at *nisi prius*, in their decision.(*m*)

TITLE II.

EXECUTIVE EQUITY.

*CHAPTER I. [*75]

TRUSTS, AND PARTICULARLY OF THOSE WHICH ARE CALLED EXPRESS.

THERE is probably no part of the jurisdiction of equity in which a more extensive or exclusive authority is exercised than in matters of trust, for with the exception of bailments and rights founded on contract, and remediable by the action of assumpsit, and particularly by the action for money had and received, which has become of such extensive use and

(*h*) Sto. 162-164; 3 J. & B. 276, 287.
(*i*) Gld. 21.
(*k*) Sto. 179, 183; 1 J. & B. 366.
(*l*) S. V. & P. 90, 181.
(*m*) 17 L. J. 287 e.

importance, trusts are left nearly exclusively to the courts of equity,(a) especially in those cases which arise under wills; and indeed, as at common law, trusts, strictly so called, being matters lying solely in *foro conscientiæ*, were unknown, they may be considered simply as creatures of equity, which are guided and governed by appropriate and ascertained rules of its courts, and have no necessary dependence for their operation upon legal principles, even when they, as they often do, as in case of descent and succession, follow the rules regulating legal estates.(b)

Trust, when used in the sense of an interest, may be defined as the equitable or beneficial ownership of real or personal property, existing separate from and collateral to the legal ownership; it gives its owner generally no right to be heard in a court of law, but imposes in equity an obligation on the conscience of the legal owner in respect of his ownership. It is similar to what a use was before the Statute of Uses,(c) [*76] excepting *that uses regarded land or corporeal hereditaments only, and could not be granted of things "*quæ ipso usu consumuntur*," or whereof seisin could not instantly be had, as personal property and terms of years or other chattel interests, whereof the holder is not seised but only possessed; or incorporeal hereditaments, as ways, commons, and the like, while trusts may be either of real or personal property.(d) Trusts in *real* estate derived their origin from the same source as uses, namely, the *fidei commissum* of the civil law, which was usually created by will, and was introduced by Augustus. It was the grant or gift of an inheritance to one upon trust to dispose thereof, or its annual produce, at the will of another, who was considered as having the *jus fiduciarium*, which could be enforced by a *prætor* especially appointed for that purpose, and called the *prætor fidei commissarius*.(e) The principles of this Roman law was, it seems, early attempted to be introduced into this kingdom by the ecclesiastics, who were much skilled in the subtleties of the civil and canon law, and about the close of the reign of Edward III. it was applied by them in evading the Statutes of Mortmain,(f) which were passed to prevent their successful encroachments on the territories of this country, for when, by means of such statutes, conveyances and gifts of land to their religious houses were prevented, instead of obtaining direct conveyances or grants as before, they obtained grants to some person who could take and hold land, with the understanding or condition that such lands should be for the use or benefit of such houses, which, though they gave no legal right to the ecclesiastics, were by the early chancellors (who were chosen from the clergy) held to give an equitable right, which bound the legal owner in *foro conscientiæ*, and obliged him to account for the profits of the land to those whom the grant was intended to benefit, and who were accordingly designated the *cestuis que use*.(g) To prevent this evasion of the Statutes of Mortmain, and the other consequences which arose from the separation of the legal [*77] and *beneficial interest, many statutes were passed, and ultimately the 27 Hen. VIII. c. 10, called the Statute of Uses, whereby the

(a) Sto. 962. (b) H. U. & T. 69. (c) 27 Hen. 8, c. 10.
(d) 1 Steph. Bl. 329-332; Gld. 105. (e) Inst. lib. 2, t. 23; Sto. 965.
(f) Sto. 969; 1 Steph. Bl. 330. (g) Steph. Bl. 331.

use was transferred into possession, or, in other words, the legal estate was transferred to the holder of the equitable, who accordingly became possessed of both, it being by that statute enacted, that when any person should be *seised* of any lands to the use of another or a body politic, such last-mentioned person or body should thenceforth be *seised* or *possessed* of the property in the like estate, quality, manner, form and condition as he or it had before in such use; but as this statute spake of one use only and not a succession of uses, the judges of those days decided that there could not be a use upon a use, and that where a common law conveyance (such as a feoffment for example) was made to A., to the use of B., to the use of or in trust for C., the last use had no operation at law, because the statute only transferred the first, and consequently vested the legal estate in B., with whom it remained; but although B. thus became complete legal owner of the property, as it plainly appeared that the intention was that C. should have the beneficial estate, equity again interfered by compelling B. to hold the property in trust or for the benefit of C., in the same manner as he would before the statute have been obliged if he had been feoffee to the use of C., and thus the old equitable doctrine of uses was revived under the name of trusts, and three different kinds of estates arose as to real estate, which may thus be classed:— 1st. The common law estate, or the estate in the land itself. 2nd. The use, which was originally recognized only in equity, but since the statute, attracts to it the estate in the land and joins itself therewith so as to make one legal estate. And 3rd. The trust, which, though it gives no legal right, entitles the owner in equity to the beneficial interest and profits.(*h*) It having also been held that the statute did not execute uses, where it was requisite that the person to whom the estate is first given should hold it in order to perform them, such person was in equity treated as a trustee and compelled to carrry out the purposes for which *the estate had been given him; thus, if an estate is given to A. in trust *to* [*78] *receive* and pay the rents and profits to another, such first person, although he must retain the legal estate to enable him to perform the trust thrown upon him, is considered in equity simply as a trustee for the other; where, however, the trust is *to permit* another to receive the rents, the use is executed in such second person, who then takes the legal estate, without there is some good reason to the contrary, as where the property is for the separate use of a married woman, and therefore requires protection from the husband by means of a trustee holding the legal estate.

And with respect to *copyhold* estates, as they are generally considered unaffected by acts of parliament which do not particularize them, and as being in their origin merely estates at the will of the lord, of which the tenant could not be seised, it was decided that they were not affected by the Statute of Uses, and also that as the statute only spoke of persons being "*seised*" to the use of others, *leaseholds*, which could only be *possessed*, although they may be created, could not be transferred under the statute any more than personal estate; so that if copyhold, leasehold or other personal property was conveyed to one for another's use, such last person,

(*h*) 1 Ves. 186.

although he had justly a right to the property, had no interest or right whatever thereto at law, equity therefore interfered and rendered justice, by obliging the person possessed at law to carry out the trust with which the property was affected.

The person who holds the property liable to the trust is called the *trustee*, and he who is entitled to the benefit is called the *cestui que trust*, and must not be confused with the *cestui que use*, who takes the legal estate under the Statute of Uses.

The trusts which have been above alluded to are called express trusts, but besides these there are implied and constructive trusts. *Express* trusts are those which are clearly expressed by their author, or may be fairly inferred from a written document: they are either imposed by direct words of trust, or by way of wish or recommendation, and in some [*79] cases a person, for the purpose of carrying out the trust, is *nominated, and in others not, in which last case the trust as to the person is one by construction of law. *Implied* trusts are those which are founded on the unexpressed but presumable intention of parties, to be gathered from the particular transaction or matter; while *constructive* trusts, though frequently confounded with implied trusts, and designated by the same name, are properly those which are raised by construction of equity, in order to satisfy the demands of justice, without reference to any expressed or presumable intention of the parties.(*i*)

Express trusts require no particular form of instrument or words to create them (except that when they relate to land, tenements or hereditaments, they must be evidenced by some writing signed by the party declaring them;(*k*) they must, however, plainly appear from the instrument creating them, or in case of personalty be duly proved by parol or other evidence, and they must have a definite subject, and an ascertained or ascertainable object; generally it clearly appears whether an express trust has or not been created, but in some cases, especially under wills, it is difficult to determine whether there is any trust, from *words of desire* instead of direction being used. It may, however, be laid down as a general rule, that expressions of recommendation, confidence, hope, wish, and desire, will create trusts whenever they appear to have been intended as imperative, if the object and subject of the supposed trust is certain and definite; but if either is indefinite, or a discretion to act or not is given, or the prior disposition of the property imparts an absolute ownership, equity will not consider such words as declaring a trust. "The *family* of A.," however, will often be a sufficiently definite description of the object, for the context may show that the heir was meant, or the child or other relations; but when the context does not show this definitely, no trust will arise from mere words of desire; thus where a testator devised his leaseholds to his brother, "hoping he would continue [*80] them in his family," this was held not to *create a trust, as the words gave a choice and left the object indefinite; and so where a testator gave the residue of his personalty to his widow, "not doubting but that she will dispose of *what shall be left* at her death to his two

(*i*) 2 Sp. 5; Sto. 1195-1254. (*k*) 29 Car. 2, c. 3, s. 7.

grandchildren," no trust was held created, because the subject was uncertain, it being not all the property but only what she thought fit to leave, and the widow was declared to take absolutely. Where, however, the words are either directly or indirectly imperative, but the objects too indefinite to be discerned, as in such case it plainly appears that the devisee or legatee was not to take for his own benefit, the property will fall into the residue and belong to the testator's real or personal representative, or residuary devisee or legatee, according to the circumstances of the case.(*l*)

Express trusts may be divided into *executed* and *executory*. The first are those which are formally and finally declared in terms by the instrument creating them, while *the others* are those which are latent in a short general direction or stipulation, and are intended to be afterwards fully and formally declared by some subsequent instrument. The latter trusts, therefore, being considered merely as heads of or instructions for a more formal instrument, are not construed so strictly as the first; so that where a testator devises real estate to trustees to convey it to certain uses, or directs money to be laid out in land to be settled to certain uses, the wishes of the testator are not to be carried out by a strict and literal adherence to the terms of the will, so as to render the direction to convey or settle nugatory, but by formal limitations adapted to effect that which the testator wished; and thus words which, if the trust was an executed one, would, according to the rule in Shelly's case, give the first taker an estate in fee, will enable a strict settlement to be made, so as to prevent parents and others taking the first estate from disappointing their children or successors by a disposition of the property.

Trusts are also frequently divided into *general* and *special*, [*81] *the first being where the trustee's duty is *passive*, as under a conveyance unto and to the use of A. upon trust for B., in which case A. has only to permit B. to use his name and act under him; and the second being where the trustee's duty is *active*, as under a trust to sell, and receive and distribute the profits. Trusts are also denominated *permanent*, where, as in a settlement for the benefit of various parties in succession, the trustee has a continuing duty to perform; and *temporary* where, as under a trust for sale, he has only some particular duty. Generally the *cestui que trust* has no right to the custody of the title deeds, or to require a conveyance from his trustee of the legal estate; but where all the active duties of the trustee have ceased, and it is not necessary either from the particular situation of the beneficiary, as where she is a married woman, or for the purpose of protecting those entitled *in futuro*, that the deeds or legal estate should remain with the trustee, he can be required to deliver over the deeds and convey the estate to his *cestui que trust* or his assigns, even if such assigns are trustees under a will for purposes which have failed, and by reason of there being no heir will be entitled to retain it for their own benefit.(*m*)

Trusts in *real* property are exclusively cognizable in equity, and although they are generally governed by the same rules as legal estates,

(*l*) Sto. 1068-1073.
(*m*) Sto. 47; 19 L. J. 27.

and particularly are subject to those rules of law which measure the duration of enjoyment and regulate the devolution and transmission of legal estates, so as to descend and be divisable in the same manner, yet they may either agree or not in point of limitation with the common law, and being creatures of equity reject altogether such rules as are founded on strict principles of tenure;(*n*) thus their owners are not subject to forfeiture and escheat as the holders of legal estates, nor are future contingent interests in them subject to failure as contingent remainders; and though in the construction of words whereby trusts are created and declared, with respect to *executed* ones, whether by deed or will, equity generally follows the law, yet in regard to *executory*, a [*82] *more liberal interpretation is, as we have seen, allowed, and before the late Dower Act (which affects marriages since 1833,) trusts, though liable to curtesy, were not to dower; and as they are incapable of livery of seisin, and of being transferred by conveyance under the Statute of Uses, they can, no matter of what kind they are, and whether vested or not, and though conferring an estate equivalent to an estate of freehold, be transferred by any instrument,(*o*) however destitute of form, which expresses the intention, provided that as to interests in land it be in writing, and signed by the party transferring or his agent lawfully authorized;(*p*) except that a married woman can only pass her interest in the usual way by deed acknowledged, and a tenant in tail, with the consent of the protector (if any,) by disentailing deed duly enrolled.(*q*)

But although no particular mode of creation or transfer is in general necessary, and equity will both enforce and aid in the carrying out of all trusts which have been fully declared and ascertained, whether they were or not created for valuable consideration, and also all trusts, whether executed or executory, raised by wills, it will not enforce a mere voluntary executory trust raised by a covenant or agreement, not even in favour of a wife or child, although formerly it was considered that it would on behalf of such near relations against mere volunteers.(*r*) *Marriage*, however, being deemed a *valuable* consideration, and not merely a good one, as natural love and affection, articles made thereon will be specifically executed, on the application of any of the persons within the scope of the marriage consideration or of those claiming under them; but it seems doubtful whether they will on the application of others (even though the wife or child of a subsequent marriage) without the non-execution would defeat any trusts or interests of those who come within the marriage consideration, or of parties claiming under them, although where equity, on the application of those entitled, decrees a specific per- [*83] formance of such articles, it does so on behalf of *all, including mere volunteers, the performance being enforced either *in toto* or not at all.(*s*)

The rule against *perpetuities* applies to equitable as well as legal estates, and, therefore, a beneficial estate in property cannot, any more

(*n*) H. U. & T. 69, 70. (*o*) Ibid. 71. (*p*) 29 Car. 2, c. 3.
(*q*) 3 & 4 Will. 4, c. 74, ss. 41, 77, &c. (*r*) Sto. 973-987.
(*s*) Ibid. 986.

than a legal one, be tied up for more than *a life or lives in being* at the time of its creation (which, if by deed, would be at the execution thereof; by will, death; by appointment, the creation of the power to appoint,) *and twenty-one years,* and a few months for gestation when necessary, *after* such, or any other designated life or lives in being at the time of such creation; and by the statute of 40 Geo. III. c. 98, trusts for the *accumulation* of the profits of property cannot be created for longer than the settlor's life, *or* 21 years from his death, or during the minority of any person living, or *en ventre sa mere* at the settlor's death, *or* the minority of any person *in esse,*(*t*) who, if of full age, would be entitled, under the settlement, to the profits. The statute, however, provides, that accumulations for the payment of debts, or for raising portions for the children of the settlor, or of persons taking under the settlement, or from the produce of timber, are not to be affected by its provisions. If trusts exceed the limits allowed by the rule against perpetuities, they are void *in toto;* but if they only exceed that against accumulations, they are only void for the excess.(*u*) It was for some time doubted whether trusts for, and powers of, sale, which were not restricted within the rule against perpetuities, were good; but their validity is now apparently settled, at least where they are given to the persons taking the estate.(*x*) They are frequently very properly inserted in mortgages, wills, and settlements, and should in all cases give full powers to the trustees, especially for enabling them to buy in and resell and give receipts for the sale moneys; for whenever property is given or devised for, or charged with, the payment of definite and ascertained sums only, and which are to be paid as soon as they are raised, to persons who can give receipts, a purchaser *or mortgagee must see that his money is properly [*84] applied, unless exempted by the declaration of the author of the trust; although it is otherwise when payment is to be made of debts generally, or of unascertained sums which are not specific charges, or, being ascertained, are not specific charges, and would involve the purchaser, if he had to see to their application, in a trust of long continuance; as where the parties beneficially entitled are, from incapacity or otherwise, unable to give receipts, or such persons are not then ascertained or entitled to immediate payment. Thus, a purchaser who buys under a trust for sale for the payment of debts and legacies, even if such trust is only for such debts as the personal estate is sufficient to pay, is not obliged to see to the application of his purchase-money; for the debts are first payable, and he could not, with certainty, ascertain their amount, without having an account taken under the authority of the court; and even if the purchaser has notice that all the debts have been paid, it seems that he is not obliged to see to the application of his purchase-money unless he is privy to some fraud, or has notice of some intended misapplication, for the moneys may be applicable to reimburse the trustee what he has paid, and the purchaser has nothing to do with the trust accounts.(*y*) If, however, a *power* is simply given for payment of such debts as the personal estate is insufficient to pay, no sale can be

(*t*) 4 Mad. 275.
(*x*) Ibid. 250.
(*u*) 1 J. W. 266.
(*y*) Forbes v. Peacock, 15 L. J. 371.

made till a deficiency is shown, for until then the power does not arise; and where the trust is for the payment of legacies or *specified* debts, which can be discharged without involving the purchaser in a prolonged trust or inquiry, the application of the purchase-money must be seen to; and where an estate is specifically *charged* with a sum of money, even though to an infant who cannot then discharge it, the purchaser can only take the estate subject thereto, without the trustees for sale have power given them to release it;(z) but as the *personal* estate of a deceased belongs to his executor or *administrator for the payment of [*85] debts in priority of other claims, such executor or administrator has full power by himself to sell or mortgage the whole thereof, even when it is specifically bequeathed to others, and the purchaser or mortgagee (without he is party or privy to some fraud) need not see how his money is applied, even if he is aware that the deceased has directed his real estate to be applied in paying his debts, and has also specifically bequeathed the property purchased or taken in mortgage; for otherwise it would be necessary for a purchaser or mortgagee, before paying his money, to ascertain from the court whether the sale or mortgage was necessary; but the purchaser or mortgagee must have no notice that his money is for other purposes than that of administration, and, therefore, the executor or administrator is not allowed to pledge or mortgage property of the deceased for securing a debt of his own to a person who is aware what property it is.(a)

Previous to the 8 & 9 Vict. c. 112, long terms of years, which were and still are frequently created for securing money lent, or for payment of jointures, portions for children and other purposes, did not, except there was an express proviso for the purpose, determine on the performance or failure of the trusts for which they were created, but the legal interest remained in the trustee and was treated at law as a term *in gross*, and as distinct from the inheritance as it was at its commencement, while in equity the term became *attendant* on the inheritance, and followed the descent to the heir, and all alienations of the inheritance, or of any particular estate created thereout by any means (whether by deed, will, or act of law,) and so as not to be devisable except as real estate, and generally to be governed in equity by the same rules as the inheritance; and this attending the inheritance may have been either by express declaration, or by mere implication; for as equity always inquires who in conscience ought to enjoy the property, the term, except where some other equity intervened, was considered as being held in trust for the real owner. By means *therefore of the joint operation of law and [*86] equity, such terms were very frequently made available for the purpose of protecting the inheritance from *mesne* estates and incumbrances: thus, a *bonâ fide* purchaser, mortgagee, or lessee of an estate, which, unknown to such purchaser or other person, had been previously sold or incumbered, was, by obtaining an assignment to a trustee for himself (or to himself, if the conveyance or other deed had not been made to him,) of a satisfied term, which had been created in the same property

(z) 5 J. & B. 137 et seq; 21 L. J. (Eq.) 15. (a) 5 J. & B. 177; Sto. 1129.

prior to such first sale or incumbrance, enabled to protect himself against such sale or incumbrance for such period as the term continued, because the term was considered at law a term *in gross*, and gave him or his trustee the legal estate as long as it continued, and consequently enabled him to defend his possession, or if out, to obtain possession against all except those who might have some prior legal title, and such a term also could by the act of the persons entitled, at any time be disannexed from the inheritance and made altogether a term *in gross*.(*b*) By the above statute, however, the benefits of attendant terms are greatly curtailed and will in time cease altogether, for such statute enacts that every term which was satisfied on the 31st December, 1845, and was then attendant either by express declaration or by construction of law, should cease, and that every term satisfied since should cease immediately upon being satisfied, with this exception, that those terms which previously to 1846 were attendant by express declaration are to afford to every person the same protection against incumbrances as they would have afforded if they had continued to subsist, and had not been assigned or dealt with since 1845; a term, however, will not be deemed to be an attendant one or to cease under the act, without it is completely satisfied.(*c*)

Although a person, not a party, who had executed a deed, was bound thereby, no one, except those who were parties thereto (except in the case of a deed-poll,) could, according to the strict rules of our common law, take any immediate estate thereby, or the benefit of any condition or covenant contained *therein; this rule, however, did not apply [*87] to future estates nor to persons who took under the Statute of Uses. The statute of 32 Hen. VIII. c. 34, and the common law, also entitled assignees of the reversion, as well as of the term or other prior estate, to the benefit of conditions and covenants which affect and run with the land;(*d*) and now by the 8 & 9 Vict. c. 106, s. 5, strangers are permitted, under indentures or deeds executed since the 1st October, 1845, to take an immediate estate or interest in, and the benefit of, any condition or covenant respecting any *tenements or hereditaments;* and equity has always allowed a person in whose favour a trust has been declared, at any time before its revocation to affirm and enforce it, although he was no party to the instrument declaring it, or it had even been declared without his knowledge; and therefore it is not necessary that creditors should be technical parties to an assignment for their benefit, or execute the deed, unless named as parties and expressly required to execute before taking thereunder. If they have notice of the trust and assent thereto, that is sufficient; and without the deed contains some stipulation for a release or other condition which may not be for their benefit, their assent is presumed till the contrary is shown; if, however, the deed is expressly stated to be made between the debtor and such creditors as subscribe the deed within a limited time, no creditor who has omitted to execute the deed, unless he has, by his own acts as regards himself, and by the acquiescence of the parties interested as regards them, become a *quasi* party, will have any interest in the trust; but even where

(*b*) Sto. 998-1002. (*c*) 18 L. J. (Q. B.) 260. (*d*) 4 J. & B. 420.

there is an express clause making the deed void at law, if not executed within a given time, it is the constant practice of equity, where the creditors have acted under the deed and treated it as valid, though they may not have executed it, to act under it and consider it binding upon the assignor; but the court will not under such circumstances allow a creditor the benefit of the trust, unless he has faithfully performed the essential conditions of the deed, and has acted consistent with its provisions.(*e*)

[*88] Until, however, the creditors *have assented to the trust and intimated such assent, an assignment of this kind is revocable by the debtor both at law and in equity, whether the creditors are individually named or not;(*f*) and where a man puts property into the hands of trustees without any communication with his creditors for the purpose of paying debts, no creditor discovering the transaction can prevent a revocation; the trust to be irrevocable must have been either under a contract with the creditors, or must have been notified to and accepted by them;(*g*) and indeed in every case in which a consignment or remittance is made with directions to apply it for the benefit of another, or a similar direction is given respecting property in the hands of an agent, the appropriation is not absolute, but revocable at any time before the person intended to be benefited has assented thereto, and notice has been given to the mandatory or agent; for a mandate from a principal to his agent (and this amounts to no more) cannot give any interest or right to a third person in the property. It is on this ground that a stoppage *in transitu* by a vendor is allowed, for a delivery by a vendor to his agent is no delivery to the purchaser; but after the party in whose favour the directions were given has assented and given notice thereof, the person holding the property becomes his agent, and must comply with his wishes, instead of the wishes of those who first directed such agent.(*h*) So if an intended husband and wife before marriage agree to settle property, either real or personal, for the benefit of themselves and issue, they can at any time before marriage (but not after) revoke such agreement; but if they settle such property (as by conveying it to trustees who accept the trust,) it seems they cannot, if the settlement was made with the approbation of the guardians or parents, without such last-mentioned parties consent, or the marriage is broken off, because of the influence which the intended husband is considered as having over the wife;(*i*) and whether, where there is no guardian or parent, they would be allowed to revoke it without breaking off the marriage is doubtful.

[*89] *CHAPTER II.

IMPLIED AND CONSTRUCTIVE TRUSTS.

ALTHOUGH with respect to express trusts of land, it has been shown

(*e*) Sp. 354. (*f*) Sto. 1036 a, b. (*g*) 2 Sp. 59.
(*h*) Sto. 1046. (*i*) 17 L. J. (Eq.) 200.

that the Statute of Frauds requires them to be evidenced by writing, *implied* and *constructive* trusts need not be thus evidenced, as they arise either from implication of the intended wishes of the parties or by the construction of law. Thus, *implied* trusts arise where other trusts (whether created by deed, will or otherwise,) fail in whole or in part, in consequence of a failure of their intended objects or purposes, or of their being too indefinite in their nature to be carried into effect, or tainted with illegality, or otherwise invalid, or of the trusts declared being fulfilled without exhausting all the property given upon such trusts; for, in such cases, the property, or such as remains unapplied, will not belong to the party entrusted with it, but will *result* for the benefit of the original owner and his heir or personal representative, according to its nature, without there is sufficient evidence or presumption that the contrary was intended; therefore, where a testator devises real property in trust to pay debts and other moneys, no beneficial interest passes to the devisee, but he is, in the first place, an express trustee for paying the debts and moneys, and then an implied trustee for the heir or residuary devisee; while, if such property had been devised subject to, or charged with debts or other sums, the whole beneficial interest would pass to the devisee, subject only to the charge, and there would be no resulting trust.(*a*) Before the 1 Will. IV. c. 40, if a testator made no express disposition of his personal estate, the executor was entitled thereto at law, and also *in equity, without it appeared from the will that the testator intended to exclude him therefrom, in which case [*90] he was by implication held a trustee for the next of kin; and for this purpose equity laid hold of any circumstance or expression in the will which showed that the testator did not intend the executor to be benefited, and thus rebut the presumption of a gift to him, and convert him into a trustee.(*b*) But now, by the before mentioned statute of Will. IV. (which affects the wills of those dying after the 1st of September, 1830,) if there are any next of kin, the rule is changed, and the executor is deemed a trustee for them in respect of any residue not expressly disposed of, unless it appear by the will or codicil that he is to take the same beneficially; but if there are no next of kin, the act does not apply, and the executor takes against the crown, without the will shows that he should not. If the executor is expressly appointed in trust, or the residue is given to him by name or as executor in trust, though no trusts or purposes are declared, or those declared do not exhaust the property, he will be excluded; though it may be otherwise if he is merely made trustee of a particular fund; so, where the character of a trustee plainly appears, or he has a legacy absolutely given him, or the residuary bequest has lapsed, or is void or cannot be carried out, the executor is not entitled; but if the legacy is simply to him for life, or being two executors, one has no legacy, or their legacies are unequal, there will be no exclusion under the old law, without the legacy or legacies were given for his or their care or trouble, in which case all the executors are considered trustees.(*c*)

An implied trust arises for the benefit of the grantor or transferor,

(*a*) Sto. 1196 a, 1245. (*b*) Ibid. 1208. (*c*) Wms. Exs. 1268.

when a conveyance or transfer of land or other property is made without any consideration express or implied, and without any distinct use or trust being declared, except it is made to a wife or a child, or person standing in the situation of a child, in which case it would be considered as for their benefit.(*d*) The use or legal estate also, in case [*91] *of no consideration or declaration of use, provided the property is *real*, will likewise, by the operation of the Statute of Uses, generally return to the original owner by way of *resulting use*, so that frequently the party making such voluntary conveyance immediately re-obtains both the legal and equitable estate which he originally had in the property he conveys;(*e*) and where a person makes a conveyance of property, and thereby limits a particular estate only, without any limitation or declaration as to the residue of the interest therein, such residue returns by way of resulting use or trust, according to the circumstances of the case, to the original owner, notwithstanding there was a consideration; for such consideration will be deemed to apply only to the estate limited;(*f*) and where a person purchases property of any kind and pays the consideration for it, but takes the conveyance or transfer in the names of third persons, either jointly or successively, or in the name of himself and another, there will be, under ordinary circumstances, a resulting trust to the purchaser, though there is no declaration of trust; for it will be assumed that the purchaser intended the property for his own use, and that the names of others were used for some particular reason, and a like rule is applied to securities taken in the names of other persons.

In these cases, parol as well as written proof of the payment of the consideration money is admissible, and such proof may be gathered from any recital or statement in the conveyance or mortgage deed, or from any writing or memorandum of the nominal purchaser or mortgagee, or from their answers to bills filed against them, or from any documents or papers left by them at their decease, or from any other source. This resulting trust, however, will not arise where the terms or objects of the instrument, or even parol evidence, or the relationship of the parties, show a contrary intention, unrebutted by other evidence or grounds of presumption; therefore, where a purchase or loan is made, and the conveyance or security is taken in the name of a wife or child who is unpro- [*92] vided for, or *of one who is by adoption in the situation of such a child, there is no trust, but the wife or child, as the case may be, take for their own benefit, it being assumed that it was intended as a provision or advancement for them, unless the other circumstances of the case show the contrary;(*g*) and so, if a party invest money in the joint names of himself and wife, or of himself and child, the wife or child surviving, will, except as against creditors of the party at the time of such investment, and sometimes even against them, be held both legally and equitably entitled, without there is some cotemporaneous evidence which shows that it was not so intended;(*h*) and the fact that the party who invested the money gives by will various legacies, which cannot be paid without the money so invested is applied for such pur-

(*d*) 2 Sp. 219; Sto. 1197. (*e*) 1 Steph. Black. 333-498.
(*f*) Sto. 1197-1199. (*g*) Ibid. 1201-1205. (*h*) 2 Sp. 219.

pose, is not allowed to affect the question ;(*i*) and, in further illustration of implied trusts, the equitable rule respecting joint purchasers and mortgagees, and the property of deceased partners, alluded to in those portions of this work which treat on such subjects, may be referred to; and although as a general rule, if a person covenants or undertakes to settle property without specifying any, such covenant or undertaking will not be considered as binding any portion of the party's property, but as only giving the covenantee a claim as a creditor by specialty, it being quite uncertain whether the covenantor intended to settle part of his present property or obtain some for the purpose ;(*k*) yet when a person, after undertaking, for a proper consideration, to lay out money in a particular kind or species of property, or to pay trustees money for such purpose, purchases similar property, it will, unless the contrary appear, be considered that such purchase was made in the fulfilment of his undertaking, and will be subject to an implied trust.(*l*)

With respect to *constructive* trusts, they, as before stated, arise simply from construction of equity, thus where a person has for a valuable consideration agreed to convey or transfer *property or pay money to or for another, a constructive trust arises in favour of the latter [*93] against the former, his representatives, and those claiming under him, with notice of the agreement, or as volunteers, for equity considers things which are agreed to be done generally as done.(*m*) Thus unpaid *purchase money* remains in equity a lien on the property bought, whether freehold, copyhold or leasehold, even though the proper and usual conveyance or transfer has been executed to the purchaser, and there is no agreement for such lien; and the purchaser is treated as a trustee for the vendor as far as the purchase money remains unpaid. At law, however, there is no lien, after a proper conveyance, even on the title deeds which the vendor has retained ;(*n*) nor even in equity, in case of a ship which has been properly transferred by registration ;(*o*) and at law, although a vendor has a lien on a personal chattel until he has completed its delivery to the purchaser, if the complete property and possession has once vested in the purchaser, repossession will not revive the vendor's lien.(*p*) The *onus probandi*, that in the particular case the lien has been displaced or waived with the vendor's consent, lies on the purchaser, even where the deed expresses that the consideration has been paid, and there is a receipt on the back; and even the fact that a security has been taken for the amount unpaid does not conclusively prove that the vendor has waived his lien, but only affords a presumption, under some circumstances, of an intention to waive the lien; and therefore, when a security is taken for the purchase money, it should always be stated whether such security is intended or not as a waiver. The principle, however, deducible from the authorities seems to be, that when the original contract is for payment of a certain sum, and the collateral or subsequent transactions, whether by way of bond, covenant to pay an annuity, or otherwise, appear to be arrangements merely for securing or

(*i*) 2 Yo. & Col. 9. (*k*) Sto. 1249. (*l*) Ibid. 1210.
(*m*) Ibid. 1212-1231. (*n*) 11 Jur. 851. (*o*) 17 L. J. (Eq.) 254.
(*p*) 16 L. J. (C. P.) 241.

providing a more convenient payment, the vendor's lien is not affected; but where it appears that the security, and *not the sum itself, [*94] was the consideration, then there is no lien; the acceptance of a mortgage of part of the estate is considered, as discharging the remainder, and of a mortgage of the whole estate, for part of the consideration, as discharging the lien for the residue. This lien for the unpaid purchase money continues to exist until the legal estate in the property is held by some one who has en equity equal to that of the vendor's, so that it prevails not only against the vendee, but also against his heir and devisees (in case or realty,) and his executors and legatees (in case of leaseholds,)—against all volunteers, against assignees under assignments for the benefit of creditors, and assignees of bankrupts and insolvents, against judgment creditors (at least before the legal estate has been actually vested in them,) against purchasers or mortgagees, having only an equitable estate, or who, having the legal, had notice of the lien before paying their consideration; for in all these cases, the party in possession having no greater equity than the vendor, the maxim, *qui prior est in tempore fortior est in re*, is attended to, and the possession of the legal estate in the last case is not allowed to prevail, in consequence of the purchaser's equity having been destroyed by the notice which he had when he paid his consideration money. A purchaser or incumbrancer, however, who holds the legal estate, and had no notice at the time of paying his money, as well as all claiming under him, either with or without notice, will prevail over the vendor's right, because, where the equities are equal, the law or legal estate prevails; and all persons claiming under the consideration of marriage, that being a valuable one, stand in the same situation as other purchasers. The omission of a receipt on the back of the purchase deed, although the payment of the purchase money is acknowledged in the *testatum*, is deemed sufficient to put a purchser on inquiry, and so is the nonproduction of the purchase deed; so that a vendor, who retains such deed, has generally a prior right to a purchaser without notice.(*q*)

The *improper conversion*, by a trustee or agent, of property *of [*95] one description into property of another also frequently creates a constructive trust; for, if the substituted property can be traced and properly ascertained, it will be held subject to the same rights of the *cestui que trust*, or principal, as the original property was, until it becomes the property of some *bonâ fide* purchaser for valuable consideration, without notice of the trust; and this equity ceases only when the means of ascertainment fail, as where the property is turned into money and confounded with other property of the same kind; but the mere conversion into money does not defeat the equity, if it has been placed to a particular account, or invested in any particular property, or has in any way been marked, so that it can be traced.(*r*) The *cestui que trust* or principal has, however, the option of either following the substituted property, or waiving such right, and proceeding for any other remedy or relief to which he is entitled, either *in rem* or *in personam;* and con-

(*q*) 18 L. J. (Eq.) 233; Sto. 1215-1229; 5 J. & B. 24. (*r*) Sto. 1258-1259.

sequently, where a trustee has improperly sold stock, the *cestui que trust* can either take the amount so produced, and the interest and profits which have been, or ought to have been made, or require the replacement of the stock and payment of the dividends, as if there had been no conversion; but such *cestui que trust* cannot insist on repugnant demands, as, for example, a payment of the interest and profits, and a replacement of the stock, or a payment of the dividends and the amount produced by the sale.(*s*)

Trust property, which is conveyed to a person who has notice of the trust, still remains liable thereto, for it is a general rule in equity, that every person who comes into possession of property, with notice of a trust, is a trustee, and bound to execute the trust; where however, trust property is conveyed to a *bonâ fide* purchaser for value, who pays his consideration money before receiving notice, such trust is extinguished, for there can be no equity against such a purchaser; and, for the same reason, a mortgagee of trust property, without, notice, will have priority; nor will the trust be revived by reason of the property coming into the hands of a person *having notice, without he was the original trustee, in which case the trust would be revived, whether the [*96] property was reobtained by purchase or otherwise. As trust property cannot be bound by any judgment or other claim against the trustee,(*t*) the court will convert any creditor, who takes the trust property or goods in execution, into a trustee; and so every person, who acquires personal property by the breach of trust or *devastavit* of an executor, of which he has notice, or to which he is a party, is responsible to those who are entitled under the will. A person, however, who knowingly obtains from the executor, for money advanced at the time, a portion of the personal assets, whether specifically bequeathed or not by the will, either by way of sale or pledge, is not liable to account as a trustee, without he knew that a breach of trust was intended, because the sale or pledge is *primâ facie* consistent with the executor's duty; but when the sale or pledge is not for money advanced at the time, but in satisfaction of the executor's private debt or liability, the property generally remains liable to the trusts of the will, because such disposition is *primâ facie* inconsistent with the executor's duty.(*u*)

A constructive trust also occurs where persons standing in a fiduciary situation, as trustees, executors, agents and others, acquire property or obtain profits by transaction within the limits of their authority or duty, for equity, as it never allows them to make by their office other than the usual and legitimate profits, will prevent them from retaining such property or profits for their own benefit, and compel them to apply it for the benefit of the persons for whom they are acting, so that if a trustee should renew a lease, or purchase at a discount an incumbrance on a trust estate, the *cestui que trust* would have the benefit, and an agent who purchases in his own name, or on his own account, will, if the principal desire it, be held a trustee for him.(*x*)

If executors or administrators by mistake, but *bonâ fide*, have paid

(*s*) Sto. 1262, 1263.
(*t*) Ibid. 977.
(*u*) 4 Mad. 357.
(*x*) Sto. 1211.

legatees or distributees before completely discharging the liabilities on
[*97] the estate, the latter are treated as trustees *for the purpose of satisfying the outstanding liabilities, for they are only entitled out of the surplus, and even where repayment cannot be enforced by the executors or administrators, the creditors, and also legatees who have paid debts, may frequently compel a refunding or contribution.(y)

And where a person, who is lawfully in possession under a defeasible title, or is only tenant for life, or joint owner, acting *bonâ fide*, expends moneys in permanently benefiting property by repairs or improvements, equity will sometimes hold a trust to arise in his favour in respect of the moneys so expended, especially where the owner or person entitled after or jointly with him comes into equity for relief against the party who has made the repairs or improvements, this equity, however, can seldom be enforced against a person who needs not the assistance of equity, without he has in some way sanctioned such expenditure.(z)

[*98] *CHAPTER III.

TRUSTEES AND OTHERS IN THEIR SITUATION.

As it is a rule of equity, that no trust shall fail for want of a trustee, whenever it plainly appears that a trust (whether an express, an implied, or a constructive one) has been created, and there is no one to carry it into effect, either by no person having been appointed, or the person appointed being dead or unable or unwilling to act, equity will, notwithstanding great difficulties or apparent impracticabilities may stand in the way, take upon itself the execution of the trust, and decree the party being in possession, or having the legal estate, of the property subject to the trust, to do what is necessary for the proper performance of such trust, without the same has ceased to subsist, or has been extinguished by the countervailing equity of a *bonâ fide* purchaser for value without notice, or other person having a conflicting equity,(a) so that if a trust is by will declared respecting property, without the legal estate being given to any one, the heir in case of real property, and the executor or administrator in case of personal, will be treated as a trustee.

Any person who can hold the legal estate in property, even the queen or a corporation, may be a trustee; and so a husband can be a trustee for his wife of property whether originally his own or not; but if the legal and equitable estates unite together in one person, the latter will merge in the former, and be no longer subject to the court of equity, for a man cannot properly be a trustee for himself alone, and if the trust estate is conveyed by a trustee to a *bonâ fide* purchaser, who has no
[*99] notice at the time of paying his consideration, *although the trustee remains personally liable, the trust will be extinct as to

(y) Sto. 503-1251.
(z) Ibid. 1234-1237; Sp. 573.
(a) 2 Sp. 52-81; Sto. 976.

such estate; but if the purchaser had notice, the estate will still continue subject to the trust. The trustee can also bind the estate by a *bonâ fide* mortgage, or other specific lien, without notice, but no judgment or other creditor's claim against a trustee can bind the estate.(*b*)

The office of trustee is considered honorary, and not to be undertaken for mercenary views; and, therefore, without there is some express provision (which may be, and is now frequently, inserted in wills and settlements,) or an implied one, enabling trustees or executors, neither can make any charge for loss of time or trouble in executing the trust,(*c*) even though they have carried on the business of the testator or settlor, or transacted business for the trust in their own business or calling, as that of a solicitor or auctioneer; they are, however, allowed and entitled to reimburse themselves and their co-trustees and co-executors out of the trust property all fair and honest expenses, which have been incurred in properly carrying out the trusts, and in suits between trustee and *cestui que trust*, the trustee is *prima facie* entitled to have his costs as between solicitor and client, more especially where the court can direct them to be paid out of the trust property;(*d*) and where a trustee is made a defendant to proceedings in equity, and being a solicitor conducts his own defence jointly with that of the other trustees, if any, he will generally be allowed his costs in the same way as if another solicitor had been employed for the purpose, for he is not brought before the court by his own act, and the reason for generally disallowing trustees' professional charges is, that it is improper to permit a trustee to profit, or to place himself in a situation to profit, by his trust.(*e*) Trustees, however, who have been guilty of laches or obstinacy, or any serious misconduct, will not only be disallowed the expenses they have incurred, but will even in some cases be obliged to pay the costs of other parties; and in a late case a trustee, who *refused to convey trust property, unless a wrongful imputation of improper conduct was retracted, was saddled [*100] with the costs of compelling him.(*f*)

The courts of equity have great power over all persons standing in the position of trustees, and will both control them in the exercise of their powers, and also, whenever there is any difficulty or impediment, and they seek the court's aid or direction respecting either the establishment, management, or execution of their trust, assist and protect them; and although executors should not for the purpose of delaying creditors, or without some good reason, take proceedings for the administration in equity of a deceased's property, they, as well as other trustees, should in all cases of intricacy and difficulty ask the direction and assistance of the court, and obtain its sanction with respect to the matters of the trust property. An executor who passes his accounts in court, and distributes the property under its direction, will be discharged from all liability, while it is otherwise with regard to one who divides without such direction, for then the division and distribution is at his own risk, and he might hereafter be called upon to satisfy some outstanding liability out of his own property.(*g*)

(*b*) Sto. 977-1264. (*c*) Ibid. 1268. (*d*) 2 Sp. 939.
(*e*) 19 L. J. 107; 20 L. J. 532. (*f*) 20 L. J. 468. (*g*) Sto. 544, 961-1276

A person who is appointed a trustee has, at any time before entering on the duties imposed upon him, an option either to refuse or accept the trust; and it seems he can so refuse at any time, no matter how long after the creation of the trust, provided he has not in any way previously acted or accepted it;(*h*) but if he has in any way acted or accepted, he cannot of his mere caprice, nor without some special reason, refuse to continue; nor can he by a transfer of the trust estate to another, or any delegation of the trust, relieve himself from liability (except under some power, or with the consent of his *cestui que trust*, or the court,) but will still remain answerable for the proper conduct of the trust, whether the delegation is to a stranger or a co-trustee;(*i*) a person who is named a [*101] trustee should therefore be careful not to intermeddle with the *trust property, or in any way accept the trust, until he has fully determined whether or not to perform its duties. If, however, a person accept a trust on the understanding that its duties are plain and simple, and afterwards finds that they are cumbersome and difficult, or that the trust or the property is involved with intricate and complicated questions, the court would, it appears, on a speedy application being made, discharge him from the office of trustee, and even in some cases order the expenses of such application to be paid him out of the trust funds; and although a person who by descent or otherwise becomes seised or possessed of a naked legal estate, which is subject to a trust, need not take upon himself the duties of such trust, he must nevertheless, on payment of his expenses, convey such legal estate as the beneficial owner desires, or refuses at the peril of being made to pay the costs of an application to the court for the purpose of compelling him.(*k*)

Trustees who are guilty of gross negligence, mismanagement, or misconduct will be removed by the court, and others substituted in their place; and such removal and substitution will also be made whenever it is essential for the due execution of the trust; so that one of a number of trustees will be removed, even though he has been guilty of no misconduct and wishes to remain, if it be inexpedient that he should continue; and whenever there is a failure of trustees qualified or willing to act, new trustees will be appointed.(*l*)

In most wills and settlements, by which trusts of long continuance are created, powers for the appointment of new trustees are now usually inserted, and are found of great use; where they are not, or the powers do not provide for the contingency which has made the appointment of new trustees necessary, equity, on application, will render the proper assistance; and in numerous cases the court has power under the recent act of 13 & 14 Vict. c. 60, on petition, in a summary way, to make the desired appointment of new trustees, and to vest the property in them, [*102] or otherwise as the circumstances *of the case require. In cases, however, which do not come within the operation of the act, or the circumstances are complicated, the application must be by the ordinary mode of procedure, namely, by bill, claim, or information, according to the particular case.

(*h*) 16 M. & W. 517. (*i*) 2 Sp. 920. (*k*) Atk. 284.
(*l*) Sto. 1287-1289.

From the circumstance that trustees and executors are not allowed (except when expressly empowered) to charge for their services, it will probably be thought that, by analogy to the case of a gratuitous bailee, they need only use customary care and diligence, such as men of ordinary prudence and vigilance exercise in the management of their own affairs, and would be liable for gross negligence; and such apparently is the case, if we take into consideration the fact, that the court has established certain rules, chiefly founded on principles of public policy, for the guidance of trustees, with which they are considered as being acquainted, and in conformity with which they are bound to act;(*l*) and as it is never the inclination of the Court of Chancery to discourage persons from acting as trustees, or throw difficulties in their way, it will not deal severely with them upon slight grounds, but endeavour, where they have acted honestly; to discharge and protect them from any mischief which may arise from an unintentional breach of trust. A trustee, however, is not only liable for losses arising from his own acts and defaults, but also for those of his co-trustees, provided he in any way (tacitly or otherwise) acquiesced therein, or could by proper diligence have prevented such acts or defaults, or the loss arising therefrom; for it is his duty not only to perform the trust himself, but also to watch over and protect the trust property, and take all possible care that his co-trustees may have no means of doing what may be injurious to such property; therefore, if by the act, direction or consent of one trustee, the trust fund is paid over to a co-trustee, even though with the object of being applied by the receiver for proper purposes, and such person wastes or misapplies it, both will be answerable for the whole, except in the case of money *remitted to a co-trustee to be paid in his neighbourhood, where the trustee remitting the same would, according to the ordinary [*103] mode of transacting business, have sent it, provided it had been his own, to some person on the spot, instead of, proceeding himself thither for the purpose of paying it, for there the trustee acts with proper prudence; and it must be presumed, that the co-trustee is the most proper party to be entrusted, and indeed the trustee would not in such case be allowed the expenses of going there; and so, if a trustee improperly allows his co-trustee to detain the trust property or money for a long period, or advances it by way of loan to him, or acquiesces in any loan of it to any person on insufficient security; and where it is arranged between the trustees that a portion of the trust property shall be managed by one and the remainder by the other, each will be liable for all losses which occur, for, having been appointed trustees, they must either act altogether or not at all; and it is always for the purpose of fuller security that two or more are appointed, and the indemnity clauses usually contained in wills and settlements do not, without they are very specially framed, at all lessen the liability of the trustee.(*m*)

A trustee, however, will not be liable for losses which occur by those acts of his co-trustees which he cannot control, nor for losses which occur without any want of customary or ordinary care or diligence on his part;

(*l*) 2 Sp. 917; Sto. 1268-1273. (*m*) Sto. 1274 et seq; 9 J. & B. 726.

thus a trustee will not be liable for the loss of money which his co-trustee has received without his sanction, if he use his best endeavours to obtain the proper investment thereof; so if a trustee deposit money with a banker of good credit, in order that it might be remitted to a proper party, he will not be answerable in case of the bankruptcy or insolvency of the banker, nor would he be liable for trust money of which he has been robbed unless it was improperly kept in his custody.(*n*)

Whenever more than one person is implicated in a breach of trust, the *cestui que trust* can, it seems, at his option, proceed either jointly against all or separately against each, even the *least guilty, for the loss which has accrued; the party, however, who is primarily made liable can in another suit seek contributions from his co-trustees unless he alone was to blame.(*o*) The real and personal assets of a deceased trustee are liable for all losses which the trustee, if living, would have had to have borne; but a breach of trust is not, even when the trustee has executed the deed under which the trust arises, considered in general as creating a *speeialty* debt, without the trustee has covenanted respecting it, or acknowledged it as a debt under seal, and therefore it will not have priority over simple contract creditors in the administration of the trustee's assets.(*p*)

[*104]

Though, as before mentioned, there is no particular limit within which proceedings must be taken for a breach of trust, equity will not, after acquiescence or the lapse of a long period, after knowledge of the breach, allow the *cestui que trust* to call upon the trustee to answer for his conduct; and the court will endeavour to deliver a trustee from any loss or injury that may arise from a misapplication of the trust fund, where it was done with the sanction of one of the *cestuis que trust* who is *sui juris*, the rule being, that if a trustee carries on the management of the trust and is guilty of a breach, yet if it is with the approbation of the *cestui que trust* such person can have no relief, and if others are interested, the loss must be first made good as far as possible by or out of the estate of the person who consented to the breach, and no one entitled to the performance of a duty, who becomes a party in delaying it, can complain of consequences arising from such delay. The degree of knowledge and caution necessary for exonerating trustees, on the ground of acquiescence, from that which is clearly a breach of trust, must be such as will amount to an actual release, and such that it would be something like a fraud then to insist on the liability of the trustee; but to preclude the beneficiary from complaining of something not having been done which the trustee with his consent might have omitted, simple concurrence on the beneficiary's part, or his acquiscence knowing the circumstances, without original *concurrence, is sufficient.(*q*) Every executor and administrator is a trustee in some sense, but between them and trustees there is this difference, that although both are equally liable for breaches of trust, that which as against the former would be evidence to charge them would not in all cases as against the latter, for as the former have full power separately and individually to receive the debts

[*105]

(*n*) Sto. 1269.
(*o*) 3 Swanst. 75-78.
(*p*) Sto. 1286; 2 Sp. 936.
(*q*) 2 Sp. 937.

due to the deceased's estate, and to collect and sell or otherwise part with such estate, and to give valid discharges for all moneys respectively paid them; if they join in a receipt with their co-executors or administrators, it will be presumed that they jointly received the money mentioned in the receipt and made liable accordingly, for as they need not have joined, they must have done so voluntarily, and apparently approved of the transactions; but with respect to trustees, as they have only joint and equal interest and power, and cannot act separately and individually, but must all join in conveyances and receipts, it cannot be inferred, from a trustee having simply joined in a receipt, that he has received the money, for there would not be a sufficient discharge without his signature, and it would frequently be impracticable, inconvenient, or expensive to require that all should together receive the money, and therefore such an act is not sufficient to make him liable for more than he was actually paid, without he has been guilty of some negligence or other act which has enabled the party receiving, to commit a breach of trust.(*r*) It should, however, be added, that, though the receipt of all the trustees is required in equity,(*s*) a receipt or release by one of several trustees is sufficient at law, except when tainted with fraud.(*t*)

Trustees must not be guilty of any neglect by which the trust property may in any way be injured or diminished in value; and therefore if a trustee omits to sell property when it ought to be sold, and it is afterwards lost, although without any fault on his part, or being perishable is destroyed, he is *liable, because the loss would never have occurred if he had not omitted his duty; and so where it clearly [*106] appeared that the lease of a trust estate ought to have been renewed, the trustees were held liable for omitting to do so;(*u*) and with respect to the investment of trust money, the court is particularly stringent, and requires not only that proper securities should be selected, but also that no unnecessary delay should occur; and trustees who keep money, in their hands longer than is necessary, will, at the option of the *cestui que trust*, be held accountable for all profits which the trustee (whether by transactions for his own benefit or otherwise) has made, if they can be ascertained, *or* for all the interest and profit which could have been made by a proper investment in the mode directed by the trust instrument, *or* else be made liable to pay the amount in interest at £4, or under special circumstances at £5 per cent. Where however no specific kind of investment is directed, and the trustee has a discretion to invest in various ways, the authorities are conflicting as to whether the *cestui que trust* can claim to charge him with the value of some particular security which might have been obtained, or only with the amount of the trust fund and interest.(*v*) From the recent decision, however, of the Lords Justices in Robinson v. Robinson,(*x*) it seems that where a trustee has the option of investing in two or more securities, as in the funds or on real security, the *cestui que trust* can only charge the trustee with the principal and interest, without further profits have been made by the

(*r*) Sto. 1280.
(*s*) 18 L. J. (Eq.) 362.
(*t*) Husband v. Davies, 20 L. J. (C. P.) 118.
(*u*) 2 Sp. 544.
(*v*) 2 Wms. Exs. 1543; 2 Sp. 924.
(*x*) 21 L. J. 111.

improper employment of the money; and although a trustee is thus accountable for every farthing of gain, all losses (if any) fall upon him,(*y*) and under special circumstances annual or other rests will be directed in taking the accounts, in order to give the *cestui que trust* compound interest against him, as where the trustee, in manifest violation of his trust, has applied the trust money in carrying on his own trade, or has fraudulently conducted himself, or wilfully refused to follow the directions respecting investment *contained in the trust instrument.(*z*) [*107] Where, from the particular circumstances of the case, it becomes necessary to have the whole or part of the trust money ready for immediate use, the trustee is justified in depositing as much as is likely to be required at a bank of due credit, or even, if the sum is not large, retaining it in his own hands, and would not be liable for the loss thereof; but he should be careful not to pay it to his own account at the bank, or otherwise mix it with his own moneys, for if he does, he will be deemed to have treated it as his own, and would then, or if he keep it uninvested longer than necessary, be liable for any loss occasioned by the banker's insolvency or otherwise. In investing, care should be taken that proper securities are selected, for if not, the trustee will be liable for any loss which arises. When there is no mode pointed out by the instrument creating the trust, the money should be invested (except when the other public funds from the time their dividends are paid are more appropriate)(*a*) in the £3 per cent. consols,(*b*) that being the stock in which the court directs property in their possession to be invested, and such an investment was even directed where the trust instrument desired the fund to be invested at the trustees' "uncontrolled discretion."(*c*) Where there is any mode of investment pointed out, the directions given should be carefully attended to. A power to invest in "real or government security" will enable the trustee to invest in any of the public funds or in freehold property; but bank stock cannot be purchased under such a power, nor, it seems, Exchequer bills, although such latter, from their ready convertibility, are proper interim investments of money to be laid out on mortgage,(*d*) and sewers bonds are not considered real securities(*e*) though turnpike road bonds are.(*f*) If the securities are restricted to England, care should be taken that the investment is there made; a power to invest in "Great Britain," however, extends to Scotland and all other parts of the kingdom, and *now by the 4 & 5 Will. [*108] IV. c. 29, a direction to invest in real security, either in England, Wales, or Great Britian, enables an investment in Ireland. Without an express power, trustees are neither justified in lending the trust money on personal security, or to their co-trustees, or to any of the *cestuis que trust;* and an authority to lend on such personal security as they shall think sufficient, does not authorise trustees to lend to a trading concern; nor are trustees justified without an authority in allowing money to remain on personal security, or otherwise improperly invested; they are not, however, immediately to call in money which they find

(*y*) 18 L. J. 77.
(*b*) 16 Ves. 11.
(*e*) 18 L. J. 77.
(*z*) Sto. 1277.
(*c*) 16 L. J. (Eq.) 125.
(*f*) 21 L. J. 118.
(*a*) 4 Mad. 189.
(*d*) 9 J. & B. 702.

placed out on good security, and indeed the court will not allow a real security, in which parties not *sui juris* are interested, to be called in without good reason, and trustees should be always careful not unnecessarily to change proper securities, and thus, through the fluctuation of the funds or otherwise, occasion losses. In investing on mortgage, the amount advanced should not exceed two-thirds of the real value of the property, or if the property consists of houses, especially trade premises, the amount should be somewhat less.(*g*)

Where legacies and residues of personalty cannot be paid, from the infancy or absence beyond the seas of the persons entitled, executors can discharge themselves by paying the amount into the Bank of England, with the privity of the accountant-general of the court of chancery, who will lay it out in the three per cent. consols. Where, however, the executor himself invested it in consols, he was held liable to the amount, and £4 per cent. interest. The payment into the bank need not be till the expiration of the dead year, without the testator has directed the amount to be sooner paid.(*h*)

The act of 10 & 11 Vict. c. 96, and 12 & 13 Vict. c. 74, now gives a general power to persons in the situation of trustees, or the major part of them, on filing an affidavit shortly stating (amongst other particulars) the trust instrument, to pay trust money into the Bank of England to the account of the accountant-general in Chancery, and to transfer any funds standing in their names, *or in intestate's or testator's, to such accountant-general, and thereupon a receipt is given them by the [*109] proper officer, discharging them from the trusts of such property; and the Court of Chancery is authorized, on petition, to make such orders as it thinks proper concerning the same.(*i*) Trustees, however, who, without any grounds, pay into court under this act, instead of transferring to new trustees properly appointed, will be saddled with the costs.(*j*)

Previous to the passing of the 8 & 9 Vict. c. 106, it was usual in wills and settlements to insert limitations to trustees for the purpose of supporting contingent remainders, and although that act has prevented the destruction of such remainders by forfeiture or other determination (not expiration) of the particular estate, they are still frequently inserted, and are useful for the protection of the property from waste, and also for other purposes. These trustees are considered as nominated for the benefit of the family, and as being entitled to exercise a discretion for that purpose, and therefore equity does not in general punish them for, or restrain them from, joining in conveyances which they think the interests of the family require, so that when such trustees, after the first tenant in tail came of age, joined in destroying the contingent remainders, equity refused to hold them liable, even though the case was one in which the court if asked, would not have directed such concurrence; they would, however, be liable, if they did so before the first tenant in tail was of age, and purchasers under them, with notice, would not have a safe title. In some few cases, as under peculiar circumstances of pressure to discharge incumbrances prior to the settlement, or in favour of creditors

(*g*) 9 J. & B. 706; 18 L. J. 706.
(*h*) 18 L. J. (Eq.) 55.
(*i*) Wms. Exs. 1763; 12 & 13 Vict. c. 74.
(*j*) 19 L. J. (Eq.) 173-175.

(the settlement being voluntary,) or for the benefit of the first objects of the settlement, as to enable the eldest son to re-settle the property on an advantageous marriage, equity has even compelled such trustees to join in conveyances destructive of or prejudicial to the estates in remainder.(*k*) Trustees to preserve contingent remainders are guilty of a breach of their [*110] *duty and answerable accordingly, if they permit the tenant for life, tenant *pur autre vie*, or other person liable for waste, to cut down or destroy timber, their duty being to preserve the inheritance, consisting of the land, houses, timber and mines, as entire as possible.(*l*) When the duties of the trustee are terminated, and he is about to pay or deliver over the trust property to the beneficiaries, a full and perfect statement and account of the trust property, and of all receipts, payments and transactions respecting it, should be made out and properly examined by all parties, and its correctness certified by the signatures of the persons beneficially entitled, who, upon receiving the sums due to them, or being put into possession of the property, should give a receipt in full, so that there may be a complete and final settlement of all the trust matters, and the trustee absolutely discharged therefrom.(*m*) A trustee, however, cannot in plain and simple cases require a release by *deed*,(*n*) and on improperly refusing to pay or deliver over the trust property without such a release, will be charged with the cost of any proceedings necessary to compel him.(*o*) In practice, however, a release by deed is seldom refused, and in most cases in which there have been numerous or intricate transactions respecting the trust, the trustee, on being refused one, would be entitled to insist on passing his accounts in the court of Chancery, at the expense of the parties so refusing.(*p*)

[*111] *CHAPTER IV.

CHARITIES.

THE execution and administration of most *charities* belong either to the crown, acting by its sign manual under the chancellor's guidance, or to the Court of Chancery, either by virtue of its general jurisdiction over trusts, or by virtue of the Lord Chancellor's authority as personal delegate under the Statute of Charitable Uses, 43 Eliz. c. 4, or as special delegate of the sovereign, who, as *parens patriæ*, has the right to guard and enforce all charities of a *public* nature. These different jurisdictions are so frequently confounded in practice, that it is often difficult to ascertain by what authority the Chancellor acts; however, it is now settled that where there is a general indefinite purpose of charity, not fixed on any particular object, its disposition is in the crown, as *parens patriæ*, and that the chancellor acts by virtue of the sign manual; but where the

(*k*) Sto. 995; 2 Sp. 950.
(*l*) 2 Sp. 950.
(*m*) Chadwick v. Keably, 2 Col. Ch. Ca.
(*n*) Hill on Trustees, p. 604.
(*o*) 1 Cox, 119; 1 Russ. & M. 634.
(*p*) 3 Rus. 583.

execution of the charity is entrusted to a trustee, and there are general or particular objects pointed out, the court acts by virtue of its general jurisdiction, and undertakes the administration of the trust, and executes it under a scheme to be reported by one of the masters of the court, not however interfering with the exercise of any absolute discretion that may be given to the trustee,(a) so that the court interferes not in the management where property is bequeathed absolutely to a corporation existing only for charitable purposes, or to the treasurer or other officer of a charitable institution (though not a corporation,) to become part of such institution's general fund, or the charity is under the direction of local visitors.(b) Before the passing of the Municipal Corporations Act, the *court did not entertain jurisdiction to compel the application to corporate purposes of property belonging to a corporation, but now it undoubtedly can, although it will not, except under special circumstances, as when its property is improperly alienated; funds, however, which were vested in such corporations for particular public purposes were always subject to the court under its original inherent jurisdiction over trusts.(c) [*112]

A charity has been defined to be a "general public use;" and though generally the poor are its sole and special objects, they need not be. In order to ascertain what is a charity, recourse is frequently had to the statute of 43 Eliz. c. 4, which enumerates various kinds, as the relief of aged, impotent, and poor people; maintenance of sick and maimed soldiers and mariners; schools of learning, free schools, and scholars in universities; repair of bridges, ports, havens, causeways, churches, sea banks, and highways; education and preferment of orphans; the relief or maintenance of houses of correction; marriages of poor maids; supportation and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives; and aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes. Charity, however, is not confined to the above purposes, but extends to all cases within the spirit and intendment of the statute; but the erection of a monument to perpetuate the memory of the donor is not a charitable purpose, nor is the repairing of a vault or tomb containing his remains, without it is to be used for the donor's family; but in general, gifts for the benefit of the donor's family are not charities; for purposes which are recognized in equity as charitable are such only as are of a public, not a private nature: and therefore a gift of property for purposes not clearly charitable, and directions to legatees to give away in private charity, or to dispose of property for such objects of benevolence and liberality as they should approve, have been held void, as uncontrollable by the court, and the next of kin decreed entitled to the property.(d) And if the purposes are *superstitious they will be void, for by several old statutes it is unlawful to dispose of property to persons for praying for the souls of dead men in purgatory, or to maintain perpetual obits, lamps, &c., and the sovereign is enabled to dispose of property so given to other purposes; and all uses (even not within [*113]

(a) 2 Sp. 247; Sto. 1187-1190.
(b) Sto. 1163; 1 J. W. 218.
(c) 2 Sp. 33-35.
(d) 1 J. W. 192.

such statutes,) if superstitious, are void; but instead of the sovereign, the donor's representatives will be entitled.(e)

Although the policy of early times was to encourage charitable gifts, at the commencement of the eighteenth century public opinion altered, and it was deemed advisable to pass the 9 Geo. II. c. 36 (usually called the Mortmain Act,) whereby it is enacted that no hereditaments, or personal estate to be laid out in hereditaments, should be given or encumbered for any charitable use, unless (except public stocks) by deed indented, sealed, and delivered in the presence of two credible witnesses twelve calendar months before the donor's death, including the day of execution and death, and enrolled in Chancery within six calendar months after execution, and unless such stocks be transferred six calendar months before the death, and unless the gift be made to take effect in possession for the charitable use, and be without any power of revocation, reservation, trust, &c., for the donor's benefit, or other person claiming under him. Purchases for valuable consideration (although it seems they ought to be enrolled and executed as above;) dispositions to or in trust for the Universities of Oxford or Cambridge, or the Colleges of Eaton, Winchester, or Westminister for the maintenance of scholars upon the foundations, and dispositions of property in Scotland, are exempted from the operation of the statute; and by subsequent acts various other exemptions have been made;(f) nor does this act extend to Ireland or the British colonies, but simply to England and Wales.

This statute has been held to extend to property of every description which savours of realty, and therefore a disposition of canal, dock, or other shares, without they are absolutely made personal estate by act of parliament, as is now generally *the case;(g) and all charges on [*114] real estate, and also money to be laid out in land, or upon condition that another provides land for the desired object, or a gift of the proceeds of real estate directed to be sold, come within the statute's operation, though it seems the proceeds of real estate already sold will not; and even if a legacy directed to be laid out in land is paid and laid out accordingly, equity will not execute the trust; and if any attempt is made to evade the statute by means of a secret trust, a discovery will be compelled; and this statute not only makes the charitable trust void, but also the devise or bequest, without there are other purposes attached thereto which are valid and distinct from the charitable ones, and require the legal estate; so that when there are no such purposes, both the legal and equitable, and when there are, the equitable subject to such purposes, goes to those who, in case no such devise or bequest had been made, would have been entitled. If the property given for charitable uses is part real and part personal, the gift will be void as to the real property only; but equity will not permit property to be marshalled in favour of a charity; and therefore if a legacy is given for a charity out of a fund arising half from realty and half from personalty, the charity would only be entitled to half, notwithstanding the testator's estate may be sufficient to pay all his legacies in full; conse-

(e) 1 J. W. 188-192.
(f) Ibid. 215.
(g) Ibid. 199; 16 L. J. (Eq.) 57, 285.

quently, whenever it is wished that a charitable legacy should be paid in full, it should be declared that it is to be paid exclusively out of the personal estate. Dispositions for charitable purposes of property, which does not savour of realty, are, however, valid, and so highly favoured in law that they have always received a more liberal construction than is allowed respecting ordinary dispositions; thus if a donor declare his intentions in favour of a charity indefinitely, without any specification of objects, or in favour of defined objects which are or become impossible, or which never existed or cease to exist, or for some cause, whether from illegality or otherwise, fail, or the donor points out a particular mode of *application which is uncertain or impracticable, the court will carry the gift out in charitable purposes *cy près*, or in other words, as near as possible to those which were intended, provided the nature of the gift, or the concurrence of other charitable gifts in the same instrument, indicates a general charitable purpose, and that, although the specified object was the favourite, yet it was not the exclusive, but that the donor, if he had known his design could not have been accomplished, would have substituted some other; but where no such indication appears, the court will not execute it *cy près*, but leave the residuary legatee (if there is one) or next of kin to take. Nor will the court, upon the ground of more extended utility, depart from the testator's directions where they are sufficiently defined and capable of being carried out;(*h*) and where there are no objects *in esse*, but some may arise, the court will retain the fund; and in cases where the income of property given for a charity becomes more than sufficient for the purposes of the trust, the surplus, instead of belonging to the representatives of the founder, will be applied in increasing the utility of the charity, or to similar charitable purposes, except where the property has been given subject only to a particular charge for the charity, in which case the donee is entitled to the increase in value;(*i*) and the omission to appoint, or the failure of trustees, is not allowed in any way to prejudice a charity; nor will a charitable bequest be inoperative because it is given to persons who have no legal corporate capacity, as to churchwardens for the benefit of the poor.(*k*) Defective dispositions, which do not contravene any statute, will also be remedied, as far as possible, in favour of charities, even though these were voluntary; and where property is given for charities abroad, the court will secure the fund, and cause it to be administered under its direction, if the charity is to be executed by persons living within its jurisdiction, and the purposes of the charity are not contrary to such public policy or law as is of a universal and moral or religious, and not simply local and *conventional character. As an instance, too, of the favour shown to charities, lapse of time is considered no bar to the enforcement of charitable trusts; and with a view to encourage the discovery of charitable gifts, it is customary for the crown to reward those who discover their existence by giving them part of the fund, or some benefit therein, if they can be brought within the intentions of the charity.(*l*)

[*115]

[*116]

(*h*) 1 J. W. 216.
(*i*) 2 Sp. 248.
(*k*) Sto. 1165-1170.
(*l*) Sto. 1185-1192.

[*117] *CHAPTER V.

SPECIFIC PERFORMANCE.

WHERE persons who ought to perform a contract, a covenant, or a duty, refuse or neglect to do so, no redress, other than in damages, can be had at law,(a) but in equity they may be compelled specifically to perform the same, whenever damages at law will not afford an exact compensation for the non-performance, whatever may be the form or character of the instrument containing such contract or covenant, or giving rise to such duty, provided it is not against legal rules and regulations, and the justice of the case; and hence a specific performance will be decreed in cases of contracts relating to *land*, because the local character, vicinage, easements, or other accommodations thereof, may give it a peculiar value in the purchaser's opinion; which damages, although they would enable him to buy other land, might not completely compensate:(b) but where damages at law would fully compensate, equity will seldom interfere. Thus a contract for the sale of *public stock*, or of *ordinary goods*, will not generally be enforced, because the damages obtainable at law will enable the purchaser to buy other stock or goods of a similar kind and value.(c) If, however, the stock is of a particular kind, as of a certain bank, railway, or other company, or the goods are of a particular value in themselves, as a painting of an eminent artist, as damages would not enable other property of a similar kind and value to be purchased, equity will enforce the specific performance; and also whenever the performance of a contract respecting goods would be decreed on the application of one side, on the ground that damages
[*118] would not fully compensate, *equity will allow the other side to sue, although relief in the nature of a compensation in damages is sought, for otherwise the remedy would not be, as it ought, mutual.(d) As to agreements also respecting *personal acts*, the same rules generally apply, damages being in some cases an exact compensation for the non-performance thereof, while in others they would not; thus, an agreement to do certain work, as to build and maintain an archway upon the defendant's, not the plaintiff's, land, has been enforced, because damages would not enable the plaintiff to enter on the land and build the same;(e) but an agreement to build must be certain and defined, and one for which complete compensation cannot be recovered at law.

In some cases the want of proper means of beneficially enforcing personal contracts, has prevented the court from interfering. Thus in the case of common covenants by tenants to repair buildings, hedges, ditches, &c., as the court has no proper means of superintending and beneficially enforcing the performance, it will not interfere; while in the cases of negative covenants in leases, such as *not to* remove manure, dig gravel,

(a) Sto. 714. (b) Ibid. 717. (c) Ibid.
(d) Ibid. 715-718, 723, 746. (e) Ibid. 721.

plough up meadow land, build, or cut down timber, as such covenants can be enforced by injunction, and damages would not fully compensate, equity renders assistance.(*f*) But an agreement to refer to arbitration, as it takes the decision of the case from the proper court of judicature, cannot be enforced, although the award, when made, can; and in general there is a difficulty in enforcing the sale of a good-will, without it is connected with something else, as the lease of certain premises, or there is an agreement not to trade within specified limits; and with respect to the assignment of a solicitor's business, for the same reason, as other good-wills, and also on the ground of public policy, it cannot be enforced, although contracts not to practise within certain limits, or for a certain period, as well as for transferring the offices, and any right to a *lien on the papers, are valid and enforceable.(*g*) And so, [*119] although equity will not ordinarily enforce a specific performance of a contract to enter into a partnership which may be dissolved at the will of either party, since that would *generally* be useless, nevertheless an agreement to enter into partnership for a specified time or purpose, and to furnish a share of the capital stock, will be enforced; and so after the partnership has commenced, the articles will be carried into effect, if they can beneficially, unless there is a complete and adequate remedy at law, or there is an agreement that all disputes shall be decided by arbitration, in which latter case, although the arbitration will not be enforced, still both equity and law will refuse to interfere, on the ground that the parties have provided themselves with the mode of determining the point in dispute.

Agreements also between heirs to divide land, as if there was no will, have been enforced, as well as those between persons to make mutual wills, where one had died after making the agreed will.(*h*)

The entering into a bond or covenant, with a penalty on condition to perform the contract, will not give the party contracting an option of paying the penalty, and thus relieving himself from the performance of the contract; and a clause that an agreement shall become void on the non-performance of certain acts, does not enable the person neglecting or refusing to perform them, to avoid the agreement, but only enables the other party to do so.(*i*)

Whenever any person refuses or neglects a duty which he ought to perform, as, for example, a lord to admit his tenant,(*j*) a specific performance will be decreed, without damages at law would completely compensate; and where the duty or promise is merely negative, a remedy is frequently afforded by injunction.(*k*)

Every contract and covenant to sell, convey, or transfer *land [*120] or other property, is considered at law simply personal and executory, and not as in any manner attaching to the property;(*l*) but, in equity, as things agreed to be done are considered for many purposes as done, the nature of the property and the interests therein are considered

(*f*) Sto. 721-725-729; 2 Eden, 128; D. Inj. 174.
(*g*) 1 Mad. 404; 3 J. & B. 472.
(*h*) Sto. 786.
(*i*) Ibid. 715.
(*j*) 17 L. J. (Eq.) 208.
(*k*) See tit. "Injunction."
(*l*) Sto. 714.

changed according to the contract, and the vendor, and those claiming under him with notice, become, as to the property sold, from the time of the sale, trustees for the purchaser and those claiming under him, and the purchaser and his representatives become, as to the money, trustees for the vendor and his personal representatives; and if between the contract and the actual conveyance any accident happens to the property, as its destruction by fire or otherwise, the purchaser must generally bear the loss; and so if any advantage accrues, he will be entitled thereto; but though the purchaser, as between himself and the vendor, generally becomes in equity the owner of the property,(*m*) the purchase of an estate tail will, nevertheless, be defeated by the death of the vendor before it is barred, and a purchaser is not allowed to injure the property in any way or cut down timber till the purchase money is paid, nor are the interests of third parties affected; and, therefore, the purchaser cannot, before the contract is carried into effect, enforce, against a stranger, equities which attach to the property; and accordingly where a bill is filed for specific performance, it ought not to be mixed up with a prayer for relief against others claiming an interest in the property.

Upon similar principles, land agreed or devised to be sold and turned into money, is for the purposes of such agreement or devise (but not further) reputed as money; and money agreed or bequeathed to be laid out in land as land, and is descendable and devisable as such, although equity allows the *cestuis que trust* (if all agree) to elect and take the property in its original state; and whenever it can be gathered from the acts [*121] of the *cestuis que trust* that they intended the *property to retain its original character, either wholly or in part, equity is governed by such intention.(*n*)

Whenever a specific performance of a contract respecting property (especially land) would have been directed between the contracting parties, it will be also directed between those that claim under them according to their interests and priorities, unless other contending equities intervene, so that a specific performance can generally be enforced by the heir, executor, devisee, legatee, or assignee, as well as the original contractor, and the heir or devisee of the purchaser can, if the assets are sufficient, require the purchase-money to be paid out of the purchaser's personal estate.(*o*) Covenants and stipulations also, which run with or are attached to the property, are enforceable either for or against the successive owners.

Contracts enforceable in equity must be—1st. Between parties willing and able to contract, and in general their remedies must be mutual. 2nd. For a valuable consideration. 3rd. The forms prescribed by law must generally be attended to. 4th. Certain and fair, and such as the law allows.

1st. To all contracts there must be two or more freely contracting parties, who are fully capable and do agree thereto expressly or impliedly, and whose remedies as a general rule are mutual; therefore agreements by *idiots or lunatics* cannot be enforced either for or against them,

(*m*) Sto. 789-791. (*n*) Ibid. 790-793, 1213. (*o*) Ibid. 783-788, 790.

although where the relief is sought against them, and not their guardians or representatives, the ground on which specific performance is refused is frequently fraud and not incapacity, for generally "no one is allowed to stultify himself." The fact of a person becoming a lunatic after entering into a contract does not, however, affect the parties' rights, except where the lunacy prevents the performance of the acts agreed to be done;(p) an executed contract, however, entered into with a lunatic *bonâ fide*, and in the ordinary course of business, is not void if the lunacy is unknown to the other.(q)

*An agreement entered into by a *feme covert* (except respecting her separate estate, and perhaps also as to property she has power to appoint,) cannot be enforced either for or against her; and although if an husband, or husband and wife, agree to sell the wife's real estate, the husband and wife can compel a specific performance, the purchaser cannot, but can only obtain damages from the husband, because a married woman cannot in such case be bound either by herself or her husband, and cannot be compelled to acknowledge a deed under the act for the abolition of fines and recoveries;(s) and as the purchaser in this case entered into an agreement which he knew he could not enforce, he must perform it, and cannot object that there is no mutuality.(t) [*122]

Contracts entered into by *infants* cannot be enforced either for or against them, for they have no power to contract except for necessaries, and the remedy if allowed to the infant and not to the other would not be mutual.(u) Nor can contracts entered into by persons under duress or compulsion be enforced against them, for they cannot be said to have agreed to that to which they were compelled.(x)

2nd. With respect to the *consideration;* besides those which consists of natural love and affection, and are designated *good*, there are *nominal* and *valuable* ones. A valuable one is either marriage, money, or money's worth. *At law*, contracts not under seal are of no force, unless founded on some valuable consideration; yet if the transaction is *bonâ fide*, the least thing which occasions either *a loss or trouble to the contractee, or a benefit to the contractor*, as to produce or search for a deed, or the payment of a nominal sum, is sufficient, and if the contract is under seal, no consideration is necessary, for a valuable one is then always presumed. And it is not allowed to rebut such presumption by proof of the contrary, although proof that the only consideration was illegal will invalidate the contract; but *in equity*, contracts, whether sealed or not, and imperfect gifts (except by will or as *donationes *mortis causa*) as well as imperfect assignments of debts, or other property, executory trusts raised by covenant or agreement, and defective conveyances, unless founded on valuable consideration, will not be enforced either against the party himself or any claiming under him, whether volunteers or not;(y) and such consideration, although it need not be altogether adequate, must not be merely nominal, or grossly inadequate.(z) [*123]

(p) Sug. V. & P. 233. (q) 18 L. J. (Exch.) 68.
(s) 16 L. J. (Eq.) 93. (t) Sug. V. & P. 230. (u) 4 Rus. 298.
(x) Sto. 229. (y) Ibid. 787. (z) See p. 44.

It was formerly thought that contracts providing for a wife or child would be enforced, although made solely in respect of natural love and affection, as against the party contracting and mere volunteers, because of the natural and moral right of such persons to be provided for. However, it now seems to be decided that equity will not interfere, but leave the parties to their legal remedies, if any. Where, however, a transfer, assignment, conveyance, or trust has been completely made or declared, so that nothing remains to give effect to the title, equity will enforce it throughout against the grantor and his representatives, although it be merely voluntary.(*a*) A settlement made by a widow on her children by her deceased husband, previous to and in contemplation of a second marriage, is founded on valuable consideration.(*b*) An act which has been executed is no consideration, without it was something from which the law implied a promise.

3rd. Contracts must in many cases be in *writing*, for by the Statute of Frauds, 29 Car. II. c. 3, s. 4, no action can be brought, 1st, whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; 2nd, to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another; 3rd, to charge any person upon any agreement made upon *consideration* of marriage (not mutual promises of marriage;)(*c*) 4th, upon any agreement (except by deed,)(*d*) made upon any contract, or [*124] sale of lands, tenements, *or hereditaments, or any interest in or concerning them; 5th, upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing, and signed *by the party to be charged* therewith, or some other *person* thereunto by him *lawfully authorized.*

And by the 17th section no contract for the sale of goods, wares and merchandizes of ten pounds value or upwards, although immediate delivery not intended or impossible,(*e*) is good, unless the buyer accepts and actually receives part of the goods sold, or gives something in earnest to bind the bargain or in part payment, or some note or memorandum in writing of the bargain be made and signed by the *party to be charged*, or their agents thereunto *lawfully authorized.*

The 7th section also requires trusts of lands, tenements, or hereditaments (except those arising, transferred, or extinguished by implication of law) (sect. 8,) to be proved by a signed writing or will; and all assignments of trusts require a signed writing, deed or will (sect. 9.)

The 9 Geo. IV. c. 14, also requires acknowledgements and promises for keeping debts alive to be in writing, signed by the *party chargeable* (sect. 1;) or agent; 19 & 20 Vict. c. 97, s. 13; and confirmation of promises made by infants must be by writing, signed by the party to be charged (sect. 5;) and so also must representations of character and credit (sect. 6.)

(*a*) Sto. 793 b; 21 L. J. 53; 23 L. J. 238, 540. (*b*) 1 Mad. 279.
(*c*) 7 M. & W. 55. (*d*) 19 L. J. (Eq.) 63.
(*e*) 9 Geo. 4, c. 14, s. 7.

Under the Statute of Frauds, the writing must contain the terms and subject-matter of, and the consideration for, the agreement with certainty, for they cannot be supplied by parol evidence, as the admission of such evidence would let in all the mischiefs intended to be guarded against by the statute; but a letter which shows these requisites is sufficient, if it affords a fair inference that the agreement is concluded, and it is not necessary that the agreement should be signed by both parties, provided the other party has accepted it, for the statute only requires the signature of the party to be *charged. Even where there is no statute preventing the contract from being by parol, [*125] if the contract is agreed upon, and reduced to writing, as a general rule, all the terms must be in writing, and parol evidence will not be admitted to add to or alter them, unless such parol addition or alteration was agreed to subsequently to the agreement so reduced into writing. Parol evidence, however, of the consideration is, it seems, admissible in all cases (except where a statute requires the contract to be in writing; even though the terms of the contract are in writing.(*f*)

There are three cases in which equity will enforce a contract, required by statute to be in writing, notwithstanding it is only by parol.

1st. Where it was prevented from being reduced into writing by the fraud of one of the parties, and its terms can be satisfactorily shown.(*g*)

2nd. Where the agreement is admitted by the answer of the defendant, and the statute is not by such answer insisted upon as a bar, for here there can be no fraud, and the defendant is considered as having waived the statute, and has by his answer given signed evidence of the agreement. In this case the plaintiff's bill should set out the whole agreement correctly, and if such has not been done, the bill should be properly amended, in accordance with the agreement admitted by the defendant.(*h*)

3rd. Where there has been a part performance and the terms of the agreement, as finally settled, can be clearly made out by satisfactory evidence. Acts which are merely introductory or ancillary to the contract are not deemed a sufficient part performance, but they must be such as are clearly and exclusively referable to a complete agreement, and have been done in part execution of its substance, so as to place the performer in a situation in which he would suffer an injury, if the other party was not fully to perform his part; the ground on which equity interferes, is that otherwise it *would be allowing him, who had permitted such part performance to injure another by a fraud [*126] which the statute was intended to prevent; hence a depositing, securing, or paying of the purchase-money is not sufficient, because the money can be recovered back at law; nor will the delivery of an abstract of title, giving directions for conveyances, going to view the estate, fixing on a valuer, making valuations, registering conveyances, and acts of a like preliminary or equivocal character, be considered sufficient but taking possession with the vendor's consent, or making improvements or expending money on the property, is sufficient.(*i*)

(*f*) 1 J. & B. 280 et seq.; 1 B. L. M. 591.
(*g*) Sto. 768.
(*h*) Ibid. 755-757; 1 J. & B. 302.
(*i*) Sto. 759-762; 1 J. & B. 306; S. V. & P. 140.

At law, evidence of parol variations of, or additions to, agreements, which, by statue, require writing, are generally inadmissible; and though it is in a few instances allowed in equity, the variation or addition must be shown by the strongest proofs, and must have been subsequent to and not part of the original transaction, and generally is only allowed to be used by a defendant in resisting a specific performance, and not by the person seeking one, for the statute does not say that a written agreement shall bind, but only that a parol one shall not. Where, however, an omission has occurred, or an alteration been prevented though fraud, parol proof thereof is allowed, as well as where the plaintiff seeks a specific performance of a contract, with parol variations or additions, which the defendant has admitted or set up, or there has been such a part performance of the parol portion of the agreement, as would enable the court to decree a specific performance in the case of an original agreement; and also in cases which do not come within the statute, where there has been a clear omission or addition by mistake.(*k*)

So where a person intends to make some provision or gift for another's benefit, but desists from doing so in consequence of some other person promising to carry into effect such intention, such promise will be enforced. Thus, where a testator meant to fell timber for securing portions for his younger children, but on the request of his eldest son not to do so, [*127] and *a promise by him that he would give the value to his brothers and sisters, desisted, and the son after his father's death refused to perform his promise, he was compelled; and where an executor promised a testator that he would pay a legacy, and requested the testator not to put it in the will, such promise was held binding.(*l*)

4th. Contracts must also be *certain and fair*, and such *as the law allows*, and therefore no relief can be given where the terms of the agreement have not fully been arranged, or cannot satisfactorily be shown. A misdescription in important particulars will be fatal, but it is otherwise if the misdescription is in slight particulars, and there is sufficient to show what is the real subject-matter of the contract, and the intention of the parties. In some cases a performance will be decreed, not according to the letter of the agreement, if that would be unconscientious, but according as it becomes necessary and fair by the change of circumstances or otherwise; and whenever an agreement is not fair and reasonable, a specific performance will not be compelled, for he who seeks equity must do equity, and must come with clean hands, and therefore if it can be shown by parol or other evidence that there has been any mistake, omission, unreasonableness, fraud, surprise, improper concealment, misrepresentation, or unfairness, or the person contracting was under duress, or intoxicated, or imposed upon by undue influence or otherwise, the plaintiff's bill will be dismissed, but if the agreement was fair and reasonable when made, no subsequent increase or depreciation of value will affect it, provided the parties had full knowledge of all the circumstances.(*m*)

A contract also will not be enforced in equity where it has become

(*k*) Sto. 770. (*l*) Ibid. 781. (*m*) Ibid. 750-779.

incapable of being substantially performed on the part of the person seeking relief, or it would be useless to enforce, *lex neminem cogit ad vana seu inutilia*, or where its performance would involve a breach of trust,(*n*) or it cannot lawfully be performed, or it is against public policy, or the plaintiff has been guilty of any negligence affecting the essence of the *contract,(*nn*) or there is a substantial defect in the title to the whole or principal part of the property, not remediable before [*128] the decree, or the character or condition of the property is altered, so that the terms agreed on are no longer applicable, or it can be shown that by fraud or mistake, the thing bought is not what was intended, or that material items have been omitted, or it can be proved that there has been a subsequent parol variation, or if on any other account it would be inequitable to require its performance.(*o*)

Contracts and assignments likewise, which involve maintenance or champerty, or the buying of pretended titles, will not be upheld in equity.(*p*) Maintenance is properly an officious intermeddling in a suit which in no way belongs to one, by assisting either party with money, or otherwise to prosecute or defend; and a contract in consideration of money which is advanced before any suit has been commenced, for the purpose of carrying one on, although not maintenance, savours so of it, that it will not be enforced. Champerty, which is a species of maintenance, is a bargain between a plaintiff or defendant and another (*campum partire,*) or to divide the property in litigation between them in case of success, in consideration of the other carrying on the proceedings at his own expense, or otherwise assisting in the expenditure, and (except in the case of father and child, an heir apparent, an husband, or a master and servant, and the like,) maintenance is forbidden both by common and statute law, as tending to keep alive strife and contention, and to pervert the remedial process of the law into an engine of oppression. The statute of 32 Hen. VIII. c. 9, prohibits the purchase of any mere or pretended right to hereditaments, unless the seller, or those from whom he claims, have been in possession of the estate, or the reversion thereof, or taken the rents thereof for one year before the sale, unless the purchaser is in lawful possession, and then he may buy in any pretended right; and he will not in any case be affected without he bought it with notice;(*q*) and *equity will not in general enforce contracts or assignments of mere naked rights to litigate, or those, [*129] which, from their very nature, are incapable of benefiting, except by the institution of, or otherwise by means of a suit, such as a mere naked right to set aside a conveyance for fraud, for here there is no interest in the assignor, but what will result from oversetting an interest in another; but if there is any *actual* interest in the assignor, independent of litigation, no objection of this kind arises, for although its enforcement may require continued litigation, yet the parties may possibly arrange the matter without further strife; and it seems that maintenance, champerty, and the buying of pretended titles, only applies where there is an adverse right claimed under a title independent of and not in privity with

(*n*) Sto. 736. (*nn*) Ibid. 771. (*o*) Ibid. 750-787.
(*p*) Ibid. 1049. (*q*) S. V. & P. 422.

that of the assignor or vendor, and not to cases in which an adverse right is claimed under a title in privity with that of the assignor or vendor, or in trust for him;(r) for a person may take an assignment of the whole interest of another in a contract or security, or other property which is in litigation, provided he do not agree to pay the costs or make advances beyond the mere support of the interest which he has so acquired. Thus an equitable interst under a contract (although disputed) for the purchase of property may be sold, and in such case the original purchaser becomes in equity a trustee for the sub-purchaser, and must allow him and his assigns to use his name in legal proceedings for the enforcement of the contract; and such sub-purchaser, without entering into any agreement for the purpose, must indemnify the original purchaser for all acts which he must do for the assignee's benefit,(s) and such sub-purchaser can in general compel the vendor to convey to him instead of the original purchaser; and so a creditor may assign his interest in a debt, although proceedings have been commenced for its recovery;(t) and whenever a [*130] person becomes assignee of a contract while it *appears good, such assignee can upset it if it is afterwards discovered to have been tainted with fraud.(u)

In order to prevent the multiplying of actions and suits, no *possibility*, right, title, or *thing in action* could, by the common law, be granted or assigned (except to and by the crown,)(x) and although this rule in most cases still continues at law, certain exceptions have at various times been made; thus, under the bankrupt and insolvent statutes, *choses in action* and other rights of the bankrupt or insolvent become vested in the assignees, and bail bonds given to the sheriff can be assigned to the execution creditor; and in favour of trade, negotiable and other mercantile securities as promissory notes and bills of exchange, are transferable, although *choses in action* generally are not, without the party liable assents, so as to enable the assignee to maintain a direct action against him on the implied promise which results from such assent, and therefore when it is wished to give a third person the benefit of a bond or debt, such transaction is carried into effect by giving such person a power of attorney to sue the debtor in the name of the original creditor, and whenever this is done for a valuable consideration the courts of law will not allow a revocation of such power, and frequently otherwise recognize and protect the rights of such person. At law also the benefit of covenants and conditions which run with or relate to the land can be claimed by or against the assignees thereof;(y) and now by 8 & 9 Vict, c. 106, contingent, executory, and future interests and possibilities, coupled with an interest, and also rights of entry in tenements or hereditaments, are (since the 1st October, 1845) alienable at law by deed, and even previously some contingencies and other contingent interests in hereditaments could pass by way of estoppel;(z) and in equity transfers and assignments for valuable considerations of *choses in action*, trusts, possibilities, and contingent interests both in real and personal estate, and

(r) Sto. 1040 c, 1048, n. (s) Ibid. 1050, 1051. (t) Ibid. 1052.
(u) 17 L. J. (Eq.) 289. (x) Sto. 1039.
(y) See 32 Hen. 8, c. 34; 4 J. & B. 420. (z) Sto. 1040; Shelf. R. P. 311.

even mere expectancies of heirs were and are still frequently *supported,(a) for such transfers are considered either as a permission [*131] to act as the agent or attorney of the other in recovering the matter transferred, even though there is no express power of attorney, or as a contract entitling the assignee to sue in equity in his own name and enforce the right directly against the person witholding it, whether such person has assented or not, making the assignor (except where his interest was only equitable, or has been completely assigned,) a party to the proceedings as well as the person against whom relief is sought.(b) Where, however, the assignee has no difficulty in recovering the right at law, or can better do so there by suing in the assignor's name, he should not apply to the court of equity;(c) and assignments of contingent interests, possibilities and expectancies, are treated in equity as contracts to assign as soon as the interest becomes vested, and will then be enforced, and any thing said or done with the design of appropriating a *chose in action*, or right, in favour of another, amounts to an equitable assignment; but notice of the assignment should immediately be given to the debtor or person in possession of the right of property, whether as trustee or otherwise, or a subsequent assignee by giving notice may obtain priority, or the debt, right or interest, may be previously paid or discharged, which, after notice, could not be done, to the injury of the assignee.(d)

Not only is the assignee of a *chose in action* entitled to all the remedies of the assignor, but takes also subject to all the equities it was liable to in his hands, for the assignor cannot generally give more than he possesses, so that any vice which affected the property in the assignor's hands will also affect it in the assignee's, whatever may have been the consideration for the assignment, and any defence which could be pleaded at law against an action brought by the assignor can generally be still pleaded, although the action is for the benefit of the assignee; and so if the assignee seeks equity, he can only be relieved, subject to the original equities, although he had no *notice of them. An executor, [*132] however, would not be allowed to set off against an assignee of a legacy a debt incurred without reference to such legacy.(e)

A person who agrees to sell or demise *real property* undertakes thereby that he has a right and title to do so, and must show the same if required; but after a conveyance the purchaser, &c., must generally rest upon the covenants in his deed, if the title turns out bad, unless there is fraud.

In purchases of *goods*, *caveat emptor* applies, and without there is a warranty either express or implied, or a fraudulent representation as to the right to sell, and the title is bad, the purchaser cannot (after paying his purchase-money) have any relief; the transaction itself may imply a warranty of title when it does not of quality. Pawnbrokers only impliedly warrant that the things they sell are forfeited pledges. Tradespeople, however, are generally considered as impliedly warranting that the things they sell are proper for the purposes for which they are sold, as in the case of victuallers, that their goods are wholesome.(f)

Before a party to a contract can compel the other side to observe their

(a) Sp. 865. (b) Sto. 1040-1057. (c) Ibid. 1057 b.
(d) Ibid. 1047. (e) Sp. 863-865. (f) 11 Jur. 827.

part, he must have performed such portions on his as are precedent, or have attempted to do so. Thus a vendor should have either executed the conveyance or have offered to do so, before bringing an action for the purchase-money; and a vendee cannot maintain proceedings for a breach of the contract before tendering a conveyance and the purchase-money, unless something has occurred which has waived this. If, however, the terms of an agreement, either through incapacity or negligence, have been unfulfilled only in particulars not of the essence of the contract; or a person having performed a valuable portion of an agreement is by accident, without any blame on his part, hindered from performing the remainder, and is not in *statu quo* as to the part performed, equity will still decree a specific performance, provided compensation can be given for the injury (if any) which may have occurred from the non-performance; and where a *purchaser applies, and the terms have not been reasonably complied with on the part of the vendor, equity will decree the purchaser a specific performance as far as possible with compensation; and when there has only been a slight and unimportant misdescription of the property, the agreement will be enforced with a just compensation.(*g*)

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*TITLE III.

ADJUSTIVE EQUITY.

CHAPTER I.

ACCOUNT.

In most cases of *account*, especially if running over any great length of time, or involved in any intricacy, equity will render assistance; for although the action of account lies at common law, yet in consequence of its inadequacy to fully relieve, and its inconvenience, it has long fallen into disuse, and the actions of covenant, debt and assumpsit, in cases in which they are applicable, frequently do not afford effectual assistance, in consequence of the delay which, from the want of effectual machinery at law, is there experienced in the investigation of the account, and the necessity which frequently occurs of obtaining a discovery, which, previous to the recent act on the law of evidence,(*a*) could not be had at law, while equity, from its mode of proceeding, is peculiarly adapted for such investigation, and the obtaining of a proper discovery and compelling the payment of whatever balance is found due.(*b*) In matters of account, therefore, which are cognizable at law, where the accounts are mutual, and also where they are unilateral, but a discovery or some other equitable

(*g*) Sug. V. & P. 261. (*a*) 14 & 15 Vict. c. 99. (*b*) Sto. 452.

assistance or remedy is sought and is requisite, equity has a general jurisdiction; but where such accounts are unilateral, or there is a single matter on the plaintiff's side, and only a set-off on the other, and no peculiar equitable assistance is sought or requisite, equity will not interfere. In all matters of account, *however, founded on equitable claims, exclusive and universal jurisdiction is exercised.(c) [*135]

Accounts are generally divided into *open*, *stated* and *settled*.

The first is an account which is not accepted by both parties.

The second is one which has been accepted by both parties, either expressly or impliedly; and it will be implied if after the account has been duly delivered no objection is made within a reasonable time, and what is so, is to be judged of by the habit or custom of business, and the ordinary course must be pursued, unless there are special circumstances to vary it or to excuse a departure therefrom. Among merchants, acquiescence will in most cases be presumed, after a lapse of several posts from the time of the transmission of the accounts.(d)

A *settled* account is one which has been arranged between the parties by themselves or their agents; but acquiescence in an account, even for a considerable length of time, unaccompanied by other circumstances, will not justify the conclusion of a settlement.(e)

The fact that the parties to the account have stated the items and struck the balance is generally a good defence to a suit, for in such a case an action of assumpsit or debt lies at law; however if there is any omission, mistake, accident, fraud, or any undue advantage affecting the account, whereby the balance is inacurrately fixed, equity will relieve, according to the circumstances, either by ordering the account to be *opened*, in which case the account will be taken *de novo* from the commencement, and each party will have to prove their respective claims, or the court will allow it to stand, and only give liberty to *surcharge and falsify*, or simply open it as to certain items.(f) Where the account has been settled, the court will not generally open it, but only grant liberty to *surcharge and falsify, without fraud is apparent.(ff) [*136] However, where the account is between persons holding a fiduciary character, as trustee and *cestui que trust*, attorney and client, &c., equity will, on slight evidence of fraud, open the account. The showing an omission for which credit ought to have been given is a *surcharge*, and the proving of an item wrongly inserted in discharge is a *falsification*; and the party having the liberty of surcharging or falsifying is always subjected to the *onus probandi*; he is, however, entitled to object both as to errors of fact and of law.

In a suit for an account, both plaintiff and defendant are considered as actors, and therefore the defendant as well as the plaintiff can obtain orders and even a decree in his favour, and many also obtain a *ne exeat* against a co-defendant.(g)

In accounts consisting of various items on the debtor and creditor's side, occurring at various times, as in a banking account, it frequently becomes of importance to consider how the payments are to be *appro-*

(c) Sto. 454 et seq. (d) Ibid. 526. (e) Ibid. 528.
(f) Ibid. 523. (ff) Ibid. 527. (g) Ibid. 521.

priated. The rule appears to be, that the debtor *when* he makes a payment is entitled to appropriate it in such manner as he chooses, and that, if he omits to do so, the creditor is entitled, *within a reasonable time*, to appropriate it to whatever debt he chooses, without the interest of third parties are concerned, or the accounts are running, in which case it is doubtful whether the creditor, without the debtor's consent, can make any appropriation, especially if he does not do so immediately on payment.(*h*) If no appropriation has been made by either, then generally the payment goes in discharge of the earliest liabilities, although if the person making the payment is indebted in a simple contract debt and also on a judgment to the same person, it seems doubtful whether such payment would be treated in satisfaction of the first contracted or most cumbersome debt.(*i*)

It is not very clear what is practically the nature and extent of the [*137] equitable rules regulating a *set-off*; it seldom, however, *occurs except in cases within the Statutes of Set-off,(*k*) or within the bankrupt laws. In cases of connected accounts, both at law and in equity, even irrespectively of the statutes, the balance alone is recoverable; and it seems that equity, under its general jurisdiction, can relieve in all cases where, though there are mutual and independent debts, yet there was a mutual credit; but the presence of cross-demands will not of itself be sufficient; and equity, following the law, will not permit a set-off of debts due in different rights, as a joint debt to be set off against a separate, or the converse, unless there was a joint credit given on account of the separate debt, or there are other special circumstances.(*l*)

Relief is sought in equity respecting accounts in cases of administration, legacies, mortgages, partnerships, and in various other matters.

[*138] *CHAPTER II.

ADMINISTRATION.

In cases of the *administration of assets*, whenever there is any complication or difficulty, chancery exercises, practically speaking, almost an exclusive jurisdiction,(*a*) based on the supposition of a constructive trust or some auxiliary ground, such as the necessity of taking accounts and compelling a discovery, or because the remedy, when it exists at law or in the Spiritual Court, is not plain or sufficient.(*b*)

Sometimes the executors or administrators apply for the court's assistance against the creditors, or other parties interested in the administration of a deceased's property, and generally such an application ought to be made whenever the testator or intestate's affairs are involved, or any difficulty occurs respecting them, so as to prevent their being safely administered without the court's direction or assistance.(*c*) Such appli-

(*h*) 1 Mer. 605; B. L. M. 638.
(*i*) Sto. 459 a, d.
(*k*) 2 Geo. 2, c. 22; 8 Geo. 2, c. 24.
(*l*) Sto. 1430 et seq.
(*a*) Sto. 543.
(*b*) Ibid. 534.
(*c*) Ibid. 544.

cations, however, are not encouraged in equity, for they could then be easily used for the purpose of delaying creditors; and therefore equity in such suits will not, before there has been a decree against the executors or administrators to account, restrain the creditors from suing at law. By the recent act of 13 & 14 Vict. c. 35, s. 19, executors are given facilities for the purpose of passing their accounts in court.(*cc*)

The assistance of equity, however, is more frequently asked *by creditors*, and any creditor is permitted to proceed *alone* for the recovery of his debt, and for such purpose to seek a discovery of assets, and thereupon an account of the deceased's assets and of that particular debt only, and not also of the general debts, is directed, and such debt is ordered to be paid in the due courts of administration;(*d*) this kind of suit may *be stayed at any time by payment of the plaintiff's demand and costs.(*e*) The more general course, however, is for [*139] one or more of the creditors to proceed on the behalf of himself or themselves, and *all others*, the *creditors* of the deceased who shall come in and prove under the decree; and then a decree is in due course obtained for the benefit of all, and all are placed on an equality with judgment creditors against the executor or administrator (the decree being deemed of equal importance with a judgment at law) so as to exclude from such time all preference for the latter. Immediately the decree is made, the executors or administators are entitled to an injunction to prevent any creditor from proceeding against them except with the court's permission; aid of a similar sort is also frequently sought by *legatees*, and where the legacies are numerous, one or more are allowed to proceed on behalf of all.(*f*)

The property of the deceased is generally called *assets*, from the French *assez*, enough or sufficient to make the deceased's representatives chargeable to his creditors and the other persons entitled thereto.(*g*) Formerly simple contract creditors could not touch the real property of the deceased, and not even specialty creditors in all cases; but, by 47 Geo, III. c. 74, the freehold estates of persons who at time of their decease were subject to the bankrupt laws, were made liable to debts generally; and now, by 3 & 4 Will. IV. c. 104, all real estate, unless made liable to debts by the will of the deceased, is made assets, to be administered in equity for payment of debts, whether simple contract or otherwise, and the heir at law, customary heir and devisees of such debtor, are made liable to proeeedings in equity respecting the same.(*h*)

Assets are divided into *legal*, *equitable*, and *statutory*.

Legal assets include such of the property of the deceased as the law gives the executor or administrator by virtue of his office for payment of debts, and therefore consists of leasehold estates and other personal property which the deceased *was possessed of or entitled to at [*140] the time of his decease, and it is immaterial whether such property can or cannot be reached without the assistance of equity; while *equitable* assets are those which do not thus belong to the executor or administrator, but which, by virtue of some power of appointment as to

(*cc*) 15 & 16 Vict. c. 86, § 45. (*d*) Sto. 546. (*e*) Ibid. 548 a.
(*f*) Ibid. 547-549. (*g*) Tol. Ex. 136. (*h*) 1 J. W. 510.

personalty, and by virtue of such a power, or the general power which all have of devising, as to realty, the deceased gives by will for the payment of his debts.

Statutory assets consist of the real estate (whether freehold, customary, or copyhold) of the deceased which he was seised of or entitled to at his death, and he has not by his will given for the payment of debts.(*i*) With respect to legal assets equity follows the rules of law, and gives the same priority to the different class of creditors which is allowed at law. The mode in which debts rank, in respect to their rights of priority of payment out of legal assets is, first, the funeral or testamentary expenses; second, debts due to the crown by record and specialty; third, debts under particular statutes;(*k*) fourth, debts of record, generally divisible into, first, judgments and decrees, and second, statutes and recognizances; fifth, specialty debts; sixth, simple contract debts to the crown; seventh, simple contract debts to subjects; eighth, debts due on voluntary bonds and like instruments. Whether judgment debts are strictly entitled to the priority assigned them has been doubted in consequence of their being no longer docketed; for by 4 & 5 Will. & Mary, c. 20, which has not been repealed, it was enacted, that, unless docketed, they should have no priority; but, probably, as the power of performing the condition has been taken away by 2 Vic. c. 11, s. 1, the penalty on non-performance has likewise ceased. An executor or administrator has also a kind of priority over other creditors, in that he is entitled to retain his own debt in preference to those in the same degree with himself, so that his specialty debt is payable before other specialty debts, and [*141] *his simple contract before other simple contract.(*l*) Wages also of domestic servants and of labourers are said by some authorities to have a preference, but this appears doubtful;(*m*) however, damages for dilapidations in respect of incumbencies seem to be postponed to other simple contract debts.(*n*) Besides the above mentioned priorities respecting legal assets, all antecedent liens, charges, and claims, *in rem*, are allowed according to their priority whether they are of a legal or equitable nature, and whether the assets are legal, equitable, or statutory; with such exception, however, *equitable* assets are distributed *pari passu* among all the creditors, except voluntary ones, without regard to the priority or dignity of their debts; and if the fund is insufficient to pay all the debts, all the creditors are obliged to abate in proportion; and if a creditor, by insisting on his priority, has been partially paid out of the other assets, he will be paid nothing out of the equitable until the other creditors have received an equal portion of their debts.(*o*) *Statutory* assets are also applied in the same way as equitable, except that specialty creditors, in which the heir is bound, are to be preferred to simple contract and other specialty creditors. As to joint creditors (not joint and separate) it is doubtful whether they would be entitled *pari*

(*i*) 3 & 4 Will. 4, c. 104; 1 Will. 4, c. 47.
(*k*) As to the post office, 9 Anne, c. 10; and from overseers of the poor, 17 Geo. 2, c. 38.
(*l*) Tol. Ex. 295.
(*m*) Wms. Exs. 880.
(*n*) Ibid. 881; 22 L. J. (Q. B.) 23.
(*o*) Sto. 557.

passu with the others, or whether they must, as in the case of bankruptcy, when the joint debtor is solvent, stay till the separate creditors have been paid.(*p*)

The mode in which the assets are now usually applied in paying the debts is as follows: 1st, The personal estate bequeathed to pay debts; 2nd, The general personal estate, including residuary bequests, not expressly or by implication exempted; 3rd, Real estate devised for the payment of debts (whether the inheritence, or only a term is carved out of it, or otherwise; 4th, Estates descending; 5th, Property, real or personal, which is charged with debts, and specifically devised or bequeathed subject therto; 6th, Probably residuary real *estate devised by wills made since 1837; 7th, Pecuniary or general legacies; 8th, Specific devises and bequests *pari passu*;(*q*) 9th, Paraphernalia and *donatio mortis causa*.(*r*) The personal estate being the primary fund for the payment of debts, is (except when exonerated by the deceased) liable to discharge all incumbrances to which a devise or specific bequest, or even a descending estate, has been subjected by the deceased either before or after his will;(*rr*) thus the devisee of an estate in mortgage is entitled to have the mortgage paid out of the general personal estate; and so a legatee of property in pawn, to have it redeemed; and the legatee of shares in a company, on which, at the time of the testator's decease, calls are unpaid, is entitled to have them paid out of the general personal estate.(*s*) If, however, the testator has shown a *clear* intention that the devisee or legatee shall take *cum onere*, he will not be allowed to claim exoneration out of the personal estate; but the addition to the gift of the words "subject to the mortgage or incumbrance thereon," is not deemed of itself sufficient to take away the right of exoneration, it being considered that such words were merely used as descriptive of the property; and this right of exoneration does not only extend against the general personal estate, but also against all those assets, which, in the established course of application, are anterior to the descended, or devised, or bequeathed property, as the case may be;(*t*) and probably the assets in the same rank would be obliged to contribute *pari passu*;(*u*) at least, in the case cited, specific legatees were made to contribute to pay the unpaid purchase money of devised real estate. If, however, the debts, charges, or incumbrances, are in their own nature *real*, as jointures, or pecuniary portions to be raised in favour of children under a marriage settlement, out of property vested in fee or in any other manner in trustees for such purpose, they must be borne by the property on which they are charged, although there may be also a personal covenant to raise them, for *such covenant is not regarded as the primary security, but only as a secondary one; and also where there is a covenant to settle lands, and raise a term thereout for securing portions, and a bond is given to perform the covenant, the property is considered the primary security.(*x*) So if the debts or other charges

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(*p*) 3 J. & B. 285.
(*q*) Tombs v. Rock, 16 L. J. (Eq.) 422.
(*r*) 2 J. W. 547; 5 J. & B. 364.
(*rr*) See 17 & 18 Vict. c. 113.
(*s*) 16 L. J. (Eq.) 243.
(*t*) Sto. 566.
(*u*) Gervis v. Gervis, 16 L. J. (Eq.) 422.
(*x*) Sto. 575.

on the property were not contracted by the testator or intestate, but by some prior owner, the personal estate will not have to exonerate them, without the deceased has in his lifetime done some act evincing a strong intention to make them his own debts ;(*y*) and the fact of the deceased having rendered himself personally liable, by giving a bond or covenant to pay, will not, in every instance, make the personal estate primarily liable ;(*z*) although if the purchaser of an estate in mortgage covenant with the mortgagee to pay the debt, and the estate is subjected to a new proviso for redemption, or if the circumstances clearly show that the purchase was not simply of the equity of redemption, but of the property itself, the mortgage forming part of the price, the purchaser will be considered as having made the debt his own ;(*a*) and a charge in a will of debts generally, will not include a debt, which in its nature is real, and has not been adopted by the deceased.(*b*)

The personal estate being, as before stated, the primary fund for the payment of debts, will not be exonerated from them simply by a provision for their payment out of the real estate, nor even by the existence of a plain intention or express declaration that the personal estate should not be applied in their discharge, but there must be not only a plain intention(*c*) to exonerate the personal, but also to onerate the realty, not merely to supply another fund, but to substitute that fund for the one primarily liable ;(*d*) and therefore without there is both a disposition of the personal estate and also another fund of personal or real estate made liable to debts, or undisposed of, out of which the debts can be paid, the [*144] personal estate remains *liable, for a mere devise or charge of real estate for paying debts, without a disposition of the personal estate, only affords a presumption that the real estate was intended to be applied in case of the undisposed personalty proving insufficient, and not that the next of kin were to be benefited at the expense of the heir or devisee; and of course a bequest of personalty (without some provision is made, or there is other property for debts,) cannot exonerate it. However, when the personal estate is bequeathed as a whole and not as a residue, and the debts, funeral and testamentary expenses, are directed to be paid out of the realty, the latter constitutes the primary fund ;(*e*) but if the bequest lapse, the exemption, when it arises from the language in which the personal estate is bequeathed, fails with the bequest as part of it, and incidental thereto; although when the real estate is given in such a manner as to indicate that the devisee is at all events to be onerated with the charge, the failure of the bequest does not affect the situation of the devisee ;(*f*) and the fact of personal estate having been given as a specific legacy would, as before mentioned, either totally exonerate it, or leave it liable only *pari passu* with the other specific bequests and the devises. In order to exonerate the personal estate, parol evidence will not be admitted, and no inference of intention can be drawn from the relative amount of the personal estate and debts, or of the personal and real estate; for the fact that the charges will exhaust the whole

(*y*) 2 J. W. 557.
(*z*) Ibid. 557.
(*a*) Ibid. 561.
(*b*) Ibid. 558.
(*c*) Ibid. 567.
(*d*) Ibid. 565.
(*e*) Sto. 586.
(*f*) 2 J. W. 593.

of the residuary bequest does not vary the construction, but the intention must appear clearly from the face of the will.(*g*)

Although the above is the mode in which the assets are applicable in the payment of debts, the creditors of the deceased are generally entitled to enforce payment out of any which they choose of the deceased's property, subject to the priorities among themselves before mentioned, and thus exhaust wholly or in part the property given to the devisees and legatees, or descending to the heir, although other property, which has a prior liability, has not been exhausted. Many other cases *also occur, in which parties, whose legal rights being confined to one [*145] fund, would fail to obtain satisfaction of their just claim, if left to the course of law, equity, therefore, in such cases interferes for the purpose of affording complete justice by means of a particular adjustment, called the *marshalling* of assets, which may be described as such an arranging of the different funds under administration, so that they may, as far as possible without injustice, be applied in satisfying all the various claims, notwithstanding certain parties are entitled to prior satisfaction out of some one or more of such funds, for *nemo ex alterius detrimento fieri debet locupletior;* so that where there are two or more funds and several claimants, some of whom can resort to all or many of such funds, and others can only resort to one, equity either compels the former to claim against the fund against which the latter cannot, so far as it will extend, or compensates the latter out of the fund in proportion to what the former has unnecessarily taken from that which formed the only means of payment to the latter.(*h*) Whenever, therefore, a creditor having more than one fund resorts to that which, as between the debtor's own representatives, is not primarily liable, he whose fund is so taken out of its proper order is placed in the same position as if the assets had been applied in due course of administration.(*i*) Thus, if the proper fund for payment of pecuniary legacies has been exhausted by creditors, the legatees are entitled to come upon the real estate descending, or charged with debts to the extent to which creditors have deprived them; and so if a specific bequest is consumed in paying creditors, the legatee is entitled to be compensated out of any of the funds which ought previously to have been consumed, and also, it seems (if the other funds are insufficient) to call upon the other specific legatees and the specific devisees to contribute proportionately to his loss. So the heir is entitled to compensation out of the general personal estate not exempted from debts, and also out of property devised or bequeathed for the payment of debts, and to contribution from the customary or *other heir; and so persons who [*146] have property devised to them charged with debts, have a right of compensation against those who are antecedently liable, and also of contribution from any in the same position as themselves; and so have the other persons entitled to the deceased's property, according to their respective priorities. In like manner, before the 3 & 4 Will. IV. c. 104, the simple contract creditors were allowed to stand in the place of the specialty or judgment creditors for the amount which the latter had taken

(*g*) 2 J. W. 567. (*h*) Sto. 558-563. (*i*) 2 J. W. 600.

from the personalty. Legatees not having a charge on land have also a similar right against legatees who have a charge. This right, however, does not altogether extend to charitable legacies which come within the operation of the 9 Geo. II. c. 36, for by that statute legacies or bequests payable out of or charged upon real estate, or in any way proceeding from or partaking of the nature of realty, are void, and equity will not, when they are given out of a mixed fund of *real and personal* estate, marshal the assets in their favour, so as to allow them to be paid out of the personal estate and the other claims out of the real, but the court distributes the fund as if no legal objection existed, and then holds that so much of those bequests fail as would thus have to be paid out of the realty; so that if the fund was half personalty and half realty, one half of such bequests would fail; if, therefore, a testator is anxious that the charitable bequests should be fully paid, he should provide a competent fund of pure personalty, and direct them to be defrayed thereout. However, where the charitable bequests have been given generally with other legacies, and the testator afterwards charges his real estate with payment of all his legacies, if the personal estate is insufficient to discharge the whole, the charities will be directed to be paid out of the personalty, and the others out of the charged estate, so that the testator's wishes may be fully performed.(*k*)

On the same grounds rests the right, before adverted to, which the heir and specific legatees and devisees have to require, that charges and [*147] incumbrances on the property descending *or given by will should be exonerated out of property standing in a prior rank of liability, and to contribution from persons standing in a similar position to themselves, and also the right which a widow has to require the prior funds to be exhausted in paying the debts before her paraphernalia (which, with the exception of her wearing apparel, is liable to debts,) is applied for such purposes, or to obtain compensation in lieu of such property.(*l*)

As to *foreigners'* assets, the general rule is, that where a domestic administrator collects assets in a foreign country without any grant of administration in such country and brings them here, they will be treated as personal assets to be administered by the domestic one; but if the property is received abroad by a foreign administrator, who takes upon himself the office, the domestic one can assert no claim thereto, although it is transmitted here, either against the foreign administrator or the person in whose hands it is; and the only mode (if necessary for domestic administration) is to require it to be transferred or distributed after all claims abroad against the foreign representative have been ascertained and settled.(*m*) The administration in regard to creditors is altogether governed by the law of the country where the executor acts, and from which he derived his authority to collect the property, and not by the law of the country where the deceased lived or was domiciled, because each nation has a right to protect its citizens. The question, however, of whether the debts are ultimately to be paid out of the real or personal

(*k*) Sto. 1180. (*l*) Ibid. 566-568. (*m*) Ibid. 584.

estate depends, in case of intestacy, on the law of the place of domicil, and in cases of testacy on the testator's intention.(*n*)

*CHAPTER III. [*148]

LEGACIES AND DONATIONES MORTIS CAUSA.

BEFORE treating of the jurisdiction of equity under this head, it will be useful to state, that a *legacy* is a bequest by testament of personal property, or of a sum of money payable out of real property, and the person to whom it is given is called the legatee. Legacies are divided into *general*, *demonstrative*, and *specific*. Under the *first* are classed those which come out of the general assets of the testator (and not out of any particular fund,) such as pecuniary legacies, and all others which are not included under the other two kinds; and they must abate, or, if requisite be totally exhausted, before the specific legacies, or the particular fund out of which the demonstrative are to be paid, can be touched for payment of debts. *Demonstrative* are those which are payable out of a particular fund, or, if that is insufficient, out of the general assets; and *Specific* are those which are particularly described, and therefore entitle the legatee to the particular article mentioned, or, if that has been parted with, destroyed or lost, fail altogether. They comprise two sorts of gifts, as where a certain chattel is particularly described, as "the diamond ring given me by A.," and where the kind of chattel is only described, as "a diamond ring."

Legacies, as well as *donationes mortis causa*, are generally treated under the head of Executive Equity; and although they partially belong to that head, yet, as the attention of a court of equity is principally called to them in administering assets, it has been thought proper to treat of them in this place under the head of Adjustive Equity.

In former times the cognizance of legacies of personal property, both before and after the executor's assent in case of general and demonstrative legacies, and until his assent in *case of specific, was left to the [*149] jurisdiction of the ecclesiastical courts, and specific legacies, after assent, to the ordinary courts of common law; the courts of equity not interfering without the legacy was subject to some trust, or charged upon land. But in the time of Lord Nottingham the Court of Chancery took upon itself jurisdiction, and now exercises herein an extensive one, which is sometimes concurrent, and at other times exclusive; and though it has assumed to itself this power, which affords more efficacious aid than is attainable in the other courts, the ecclesiastical courts still exercise the same jurisdiction as formerly, without it appears that they cannot in the particular case administer complete justice; in which case the Court of Chancery will prevent proceedings being there carried on, and afford the requisite relief. And in the ordinary courts of law (except in the county

(*n*) Sto. 586-588.

courts where the amount of the legacy desired to be recovered is under £50,(a)) no proceeding can be instituted for the recovery of a legacy without it is specific, and the executor or administrator has assented to it; because all the personal property of the deceased vests in such executor or administrator for the purpose of paying the debts, and the legatees are not entitled to any portion till such debts have been fully paid or satisfied; but in case of the assets proving inadequate to pay both, the legacies must abate, or fail altogether, according to the amount of the deficiency; for a man must be just before he can be allowed to be generous. A bequest, therefore, transfers only an inchoate right to the legacy, which is not perfected till the executor or administrator has assented thereto; and this he should not do until he has either paid or reserved sufficient to discharge all the liabilities of the deceased; for if he was to pay or deliver over legacies, and the residue of the assets proved deficient, he would make himself personally liable for the debts. The law, therefore, to protect the executor, imposes the necessity of his *assent*, before a legacy can be completely vested in the legatee, but if it has once been given, considers it as irrevocable and an admission that he has sufficient for its [*150] *payment. In analogy to the period allowed by the Statute of Distributions, the executor is generally allowed one year to discover and fully discharge the testator's debts. And it seems that if he has, during that time, used due diligence, and afterwards pays over the legacies, without knowledge of further debts, he will not generally be personally liable; but the creditor's remedy (if any) will be against those who have received their legacies, to compel them to pay him thereout. The law, having prescribed no particular form in which assent must be given, considers any act, however slight, which expressly or impliedly shows that the executor consents to the legatee taking the bequeathed property, as sufficient. Thus, where the executor congratulated the legatee on his legacy, and also where he proposed to buy the legacy from the legatee, he was considered as having assented.(b)

If the legacy is specific, then the assent immediately vests the property in the legatee, so that he can maintain an action at law in the same manner as for his own property; but with regard to other legacies, as the assent does not make their amount a debt from the executor, or otherwise change their nature, no action at law (except in the County Court as before stated) can be maintained, the executor being simply a trustee for their payment, and if payable out of the personal estate, proceedings must be had either in the Ecclesiastical Court or in Equity; and where the legacy is subject to some trust or charged on land, or the Ecclesiastical Court, or even in case of a specific legacy after assent the Court of Law, cannot take due care of the interests of all parties, equity will assert an exclusive jurisdiction, and prevent the proceedings in the other courts, for the interposition of equity is often necessary for the discovery, account, or distribution of assets, or some other relief, which the other courts cannot so adequately afford. Thus, where legacies are given to infants, equity has exclusive jurisdiction, because it can give proper directions for

(a) 9 & 10 Vict. c. 95, s. 65; 13 & 14 Vict. c. 61.
(b) Wms. Exs. 1175 et seq.

securing and improving the fund, which the other courts cannot,(c) and where a husband sues in the Ecclesiastical Court for a legacy *belonging to his wife, equity will restrain him by injunction, [*151] because that court cannot, like a court of equity compel a suitable settlement thereout on her and her family;(d) and so if a legacy is payable on a future day, whether contingently or not, equity will direct the executor to give security for its payment, or to pay a sufficient amount into court, even though there is no actual waste, or danger thereof, although, where a specific legacy is bequeathed to a person for life, with remainder to another, such last, unless he alleges and proves waste or danger thereof, cannot compel the person firstly entitled to give security for its due delivery at the proper period, but can only require an inventory of the property, so that he may be enabled to identify it, and on his right accruing to compel its delivery over.(e)

Equity in deciding on the nature, validity, and interpretation of gifts of purely personal property, is guided by those rules of the civil law, which are acted upon in the spiritual courts, while in determining points which arise respecting legacies which are charged on land, it generally follows the rules of common law; and the construction, therefore, is much more liberal in the former than in the latter cases.(f)

Legacies are either *vested* or *contingent*. The *first* kind does not solely comprise these of which the legatee is entitled to have the immediate possession, but also those, to which, although the enjoyment is postponed, he has a present absolute title, as where a sum of money is given to a person *in esse* immediately on another's death; while *contingent* legacies are those to which the legatee has at the time no absolute title, but only a conditional one, as where a sum of money is given to one in case he survives another; and therefore as to the first, in case of the legatee's death before he receives it, his executors or administrators will be entitled, while in the other they will not, but a lapse will occur; thus if a legacy is given to a person, with a *direction* that it shall *be paid* at, when, or if he attain twenty-one, such legacy is vested, and in case of the legatee's death before twenty-one will belong to his executors *or administrators, although, except where it is payable with interest, he [*152] cannot claim it till such person would, if he had lived, have come of age, for it is an interest *in presenti*, although it be *solvendum in futuro*,(ff) without it is charged upon real estate, in which case it will be considered only as contingent, unless the postponment was for the convenience of the estate, and not because of the situation of the legatee, as where the estate is given to one for life, and the legacy is to be paid on his death;(g) and so it will, even in cases of purely personal legacies, be considered contingent, if *given* to him at, when, or if he attain twenty-one, for in such case there is no gift *in presenti*, and neither he nor his representatives will be entitled to it without the specified age is attained,(h) unless he is given the interim profits, or it is clear that the postponement was

(c) Sto. 592-600. (d) Ibid. 598.
(e) Ibid. 603, 604, 845 a. (f) Ibid. 602, 608.
(ff) Wms. Exs. 1051. (g) Ibid. 1077. (h) Ibid. 1057.

simply for the convenience of the estate, as where a life interest is previously given to another.(*i*)

Legacies also may be vested subject to be divested, in which case the death of the legatee will not occasion a lapse, but it will only be subject to be defeated by the event which is specified, as where a legacy is given to A., but if he should die without leaving issue, then to B.; here A. can dispose of it, and has the absolute interest therein, subject only to a deprivation by death without leaving issue. And so where a legacy is given to all the children of a person, the first child takes the whole, subject to the condition of letting in the other children to a participation on their respective births. If the person to whom a legacy is given dies before the testator, it generally *lapses*, and in most cases falls into the residuum of the testator's estate, or if charged upon land, or arising from the produce of land, ceases, for the benefit of those who, in case no legacy had been given, would have taken the property; and the same occurs even if the legacy is given to the legatee and his executors or assigns, and the testator has expressed an intention that it shall not lapse, although a *bequest may be specifically framed to prevent such lapse, as by [*153] giving the legacy to A. and declaring that if he shall die defore the testator, his legal personal representatives or next of kin shall take. A legacy to two or more as joint tenants is not within the rule, for on the death of one, the whole will survive to the other, although if it is given to them as tenants in common, there is a lapse as to the share of the one dying. Nor is there any lapse where the legacy is given over after the death of the first legatee, for in such case the legatee in remainder will take immediately on the testator's death, should he outlive the prior legatee; and when the legatee who dies is a trustee, the *cestuis que trust* will not be deprived; and by the new Wills Act(*j*) a bequest or devise for a longer duration than life to a child or other issue of the testator, who dies leaving issue which survives the testater, does not lapse, unless a contrary intention appears by the will, but belongs to such legatee as if he had survived, and passes under his will, or in case of intestacy descends and is distributable as such legatee's own property.(*k*) Legacies also lapse where they are given upon some event which never happens. As to those legacies which are purely personal, and fail either by illegality, lapse or otherwise, they, it seems, fall into the residue, and belong to the residuary legatee (if any,) or if none to the next of kin; and those which are charged upon real estate cease, for the benefit of the person entitled to the property, which was subjected to them; and when they consist of the produce of real estate, they will belong to the heir or other person who is entitled to the residue of the real estate, it being considered that the conversion was not absolute, but only for the purposes of the will, without in each case something to the contrary plainly appears from the will.

Where a testator has bequeathed two or more legacies to the same person, it frequently becomes a question whether there is a mere repetition of the first, or it was intended that the legacies should be cumula-

(*i*) Wms. Exs. 1059-1065.
(*j*) 1 Vict. c. 26, s. 33.
(*k*) 13 L. J. (Eq.) 79.

tive and the legatee take both or all; where the same thing is twice given, of course it is as if one bequest had been made; and if the bequests are *by the same instrument, the legatee will take only one, unless they are different in quantity or quality; but if they are by dif- [*154] ferent instruments, the presumption of intention is *prima facie* that they are cumulative; but this presumption may be rebutted by evidence from the instrument itself, as that the language of the gift shows the contrary, but not by extrinsic evidence.(*l*)

Although specific legacies carry with them all dividends or other profits which accrue to them after the testator's death, no interest is generally payable upon other legacies without they are retained by the executor longer than a year from the death, which, as before mentioned, the executor is allowed for discharging the debts; and in case of such retention, interest is only allowed from the end of the year at 4*l.* per cent., or at such other rate as is mentioned in the will, unless the testator has mentioned a time for the payment of the legacy, in which case the legatee is entitled to interest from such time, whether it is before or after the end of the first year. And where the legacy is to a child or grandchild of the testator, who is otherwise unprovided for, interest is payable from the death, so that the legatee may have some provision for maintenance; this, however, does not seemingly extend to illegitimate children, or even to the widow or other relations of the deceased, but with respect to an annuity, such is generally calculated from the testator's decease.

Legacies which are of the value of 20*l.* (excepting those given to the deceased's wife or husband, and to any of the royal family and certain corporations) are liable to certain duties according to the relationship of the legatees; thus, if the legatees are lineal ascendants or descendant of the deceased, 1*l.* per cent.; if brothers or sisters or their descendants, 3*l.* per cent.; if uncles or aunts or their descendants, 5*l.* per cent.; if great uncles or aunts or their descendants, 6*l.* per cent.; if other relations or strangers, 10*l.* per cent.; and upon payment of a legacy, the executor must take a receipt for the same stamped (not as a common receipt, but under the legacy duty acts,) according to the value of the legacy, and he must *take care to pay to the proper party, for even if he [*155] is an infant, the payment, as a general rule, cannot be made to the father or other relation without the sanction of the Court of Chancery; and therefore in such case, as the infant can give no receipt, and also where the legatee is beyond the seas, the executor must either keep the amount (less the legacy duty) invested, and protect it and the accumulations, until he can obtain a proper discharge; or can, if he likes, free himself from responsibility by paying the same, with the privity of the accountant-general, into the Bank of England, and the amount is thereupon invested in the 3*l.* per cent. consols, subject to the orders of the Court of Chancery on motion or petition in a summary way;(*m*) and now this power of paying in and discharging themselves from liability is

(*l*) Lee v. Pain, 4 H. 216; Sto. 1123 a.
(*m*) 36 Geo. 3, c. 52.

extended generally to executors and trustees who have moneys of others in their possession.(*n*)

Legacies are payable in the currency of the country where the testator lived at the time he made his will, unless he has otherwise directed.

In closing this subject, it will be as well to allude to *donationes mortis causa*, or gifts of personal property made by a person in extremity, over which equity maintains a concurrent jurisdiction whenever the relief at law is not adequate and complete, as frequently happens from the necessity of discovery or otherwise. The name, as well as the doctrine respecting them, is borrowed from the civil law; and in the Institutes the following definition will be found: "mortis causa donatio est, quæ propter mortis fit suspicionem, cum quis ita donat ut si quid humanitus ei contigesset, habere is, qui accepit; sui autem supervixisset is, qui donavit, reciperet vel si eum donationis pœnituisset, aut prior decesserit is, cui donatum sit."(*o*) The gift must be of personal property, and by one in danger of death, evidenced by a delivery to the donee, or some one on his behalf, of the subject of the donation, or of the means of obtaining [*156] possession, or of the instrument *by which the property was created; and the donee takes with a condition that the gift shall be void in the event of a recovery from the present disorder, or of a revocation during the donor's life; and the donor must have parted with the dominion as well as the possession of the property. It was formerly thought that, where a delivery, from the nature of the subject-matter, would not execute a complete gift *inter vivos*, it could not create a *donatio mortis causa;* but it is now established, that equity will in such cases consider a delivery of the instrument which created the property sufficient, and that a trust, enforceable in equity, can thus be created for the benefit of the donee. So that negotiable instruments, bonds and mortgages, may be the subject of such donations, although simple contract debts (except where they are recoverable under some special written contract) cannot be so, because of the absence of anything relating to them which can be delivered over; and though it has been held, that a delivery of receipts for South Sea annuities was insufficient,(*q*) yet a delivery of a receipt, in which there was a statement that the sum therein mentioned carried interest, was held sufficient.(*r*) Where the property is such that it cannot be actually delivered, a delivery of part, or of something which affords power to obtain possession thereof, is sufficient; so that goods in a warehouse, or in a trunk, can be thus given by delivery of the key.(*s*) These gifts partake partially of the nature of gifts *inter vivos*, and partially of legacies. Thus they resemble a gift *inter vivos*, and differ from a legacy, in that they take effect from the time of the delivery, and not of death; and therefore cannot be proved in the spiritual courts, and require no assent or other act of the executor to perfect them; while they differ from a gift *inter vivos*, and agree with a legacy, in that they are revocable during the donor's life, may be

(*n*) 10 & 11 Vict. c. 96; 12 & 13 Vict. c. 74. (*o*) Lib. 10, t. 7.
(*q*) Wms. Exs. 650-658. (*r*) 20 L. J. (Eq.) 627.
(*s*) Wms. Exs. 655.

made to the donor's wife, and are liable to legacy duty, and, on deficiency of assets, to the donor's debts.(*t*)

*CHAPTER IV. [*157]

SATISFACTION AND ELECTION.

SATISFACTION may be defined as "the donation of a thing with the intention expressed or implied that it is to be an extinguishment of some existing right or claim of the donee;"(*a*) and questions in equity under this head commonly arise, 1st, In cases of legacies to creditors; 2nd, In cases of portions given by will; and 3rd, Of portions given by settlements; and in all cases where the satisfaction is a matter of presumption, such presumption may be rebutted either by extrinsic evidence, as statements of the deceased, or by intrinsic evidence obtained from the will.(*b*)

1st. Where a debtor bequeaths to his creditor a legacy equal to or exceeding the debt, it is presumed, in the absence of any intimation of the contrary, that the legacy was intended as a satisfaction of the debt, for *debitor non presumitur donare;* but where the legacy is of less amount than the debt, there is no satisfaction even *pro tanto*, and though equity leans against double portions,(*c*) it will lay hold of any minute circumstances to prevent a satisfaction of a debt. Thus there is no satisfaction where the debt was contracted after the will, or is due on a current account, or on a negotiable security, or the legacy and debt are of a different nature as to the subject-matter or as to the interest therein, or there is a difference as to the time of payment, or where the legacy is contingent or uncertain or consists of a residue, or where the will contains an express direction for payment of debts, or a motive is assigned for the gift; but it is said that in case of deficiency of assets, a legacy shall always be construed as a satisfaction, and a legacy *to a [*158] child or wife is as much a satisfaction of a debt, strictly so called, as a legacy to a stranger.(*d*)

Bequests by creditors to debtors are not *prima facie* considered as a release or extinguishment of the debt, unless evidence clearly expressive of an intention to release appears impliedly or expressly in the will, or from other sources. A bequest of a debt to a debtor is treated as a legacy to him, and is subject to legacy duty, and to the payment of the testator's debts, and abates or fails accordingly. Where a legatee is indebted to the testator, the executor is entitled to retain the legacy in satisfaction, as far as it will go, of the debt by way of set-off, even, it seems, if the remedy for the debt had ceased at the time of the testator's death by reason of the Statute of Limitations.(*e*)

(*t*) Wms. Exs. 660; Sto. 606, 607 c.
(*b*) Ibid. 1102-1109.
(*d*) Sto. 1103-1122; Wms. Exs. 1112-1115.
(*a*) Sto. 1099.
(*c*) Page 159.
(*e*) Wms. Exs. 1119; Sto. 1123.

2nd. A bequest, other than a residuary one, by a parent or any other person who was in *loco parentis*, as to providing for another's child, will, in the absence of evidence to the contrary, be considered satisfied or adeemed, if such person afterwards, by deed or other act *inter vivos*, make a provision for such child of greater or equal amount, of like certainty and of a similar kind, and in other respects equally beneficial, and no other distinct object is pointed out; and it is not necessary that it should be expressed to be in lieu of the bequest; and where the difference in amount or otherwise is not great, it will be deemed a satisfaction *pro tanto*, and even in some cases a complete satisfaction or ademption, but where the difference is large or important it is otherwise.(*f*) Such constructive ademptions, however, have never been applied to mere strangers, unless under particular circumstances, as where the bequest is for a particular object, and a sum is afterwards given by the testator for the very same object and no other, and illegitimate children and all other relations (except children) are considered as strangers.(*g*)

[*159] 3rd. Where a parent or person standing in *loco parentis*, *being under an obligation by articles or otherwise to provide for a child, gives such child a legacy, such will *prima facie* be presumed to be a satisfaction or performance of the obligation, provided it is *ejusdem generis* or nearly so, and substantially the same in value, time of payment, and certainty, and otherwise equally beneficial with the provision, and is not given for a different object; and as equity inclines against double portions, the rule has been established with fewer exceptions than with regard to the satisfaction of debts, and though the bequest be less in amount than the portions, or payable at different periods, they will still be a satisfaction either altogether or *pro tanto*, according to the circumstances. And on similar grounds, if a person covenants to leave his wife so much, and dies intestate, her share under the Statute of Distributions is deemed a satisfaction as far as it extends,(*h*) and the same holds with respect to a child, but such share would not be a satisfaction of a clause in a marriage settlement respecting advancement in the *lifetime* of the settlor,(*i*) nor of a covenant to leave a widow an annuity.(*j*)

Election, which is the selection of one of two rights, by a party who derives one of them under an instrument which clearly shows that, expressly or impliedly, it was not intended he should enjoy both, is frequently compelled in equity. It has for its basis a principle which is of general applicability, namely, that a person cannot accept and reject the same instrument;(*k*) accordingly, if a person accepts a benefit under any instrument, whether a deed or will, he must, at least in equity, adopt the whole, giving full effect to its provisions and renouncing every right inconsistent with it; and the fact that the person making or executing the instrument was under the erroneous impression that he had power to deal with both rights, does not affect the case, and the doctrine is applicable

[*160] to all rights, whether relating to real or personal estate, *and whether immediate, remote or contingent, of value or not of value.(*l*)

(*f*) Sto. 1104-1111.
(*g*) Ibid. 1117, 1118.
(*h*) Ibid. 1104-1169; Wms. Exs. 1116.
(*i*) Sto. 1115 n.
(*j*) 17 L. J. (Eq.) 480.
(*k*) Sto. 1075.
(*l*) Wms. Exs. 1236, 1237; Sp. Eq. 585; J. W. 385.

At law, a person is allowed to assert repugnant rights so far as the intention of the party constitutes repugnancy; and, therefore, if a feoffment, either before or after marriage, is made to the use of the husband for life, remainder to the use of A. for life, and then to the wife for life, in lieu of dower, there is no jointure within the statute; and notwithstanding A.'s death before the husband's, and the entry of the wife upon the husband's death, she could still claim dower; but where the estate given is such as the statute recognizes as a proper jointure, she cannot, even at law, claim both it and dower. The decisions, however, on such statute are based on the statute itself, and not on the common law, and are the only cases in which the doctrine of election has been applied at law in a way similar to its application in equity. A party, however, will even at law, be made to elect between rights which, though technically capable of assertion at the same time are *clearly* inconsistent; as in the case of a contemporaneous estate for life and in tail in the same property; or a claim of a tenant under and against his landlord; or a claim to dower both in the land taken and in that given in exchange, and in other analogous cases.(*m*)

In equity, election principally arises where a testator or grantor assumes to dispose of that which belongs to another person, and by the same document gives such person other property or some benefit; in which case the person who is the object of such gift must elect whether he will retain his own, or allow it to go according to the donor's wishes; for he cannot take both his own and what is given him, but must, if he accepts the gift, resign his own, or at least so much as the gift is worth; or, if he elects to retain his own, he cannot have the gift also. And, in the latter case, equity will, in order to carry out as far as possible the intention of the donor, and prevent it from being defeated by such election against *the instrument, treat such gift, or at least so much as is necessary, as a trust in the person so electing, for the benefit of the [*161] person deprived by the election. And this rule held even in the case of a devise, previous to the recent Wills Act,(*n*) to the heir (although according to the old law he took the property devised by descent and not by purchase,) if by the same will the testator assumed to give another a right or property belonging to the heir.(*o*) The doctrine, however, is not applicable where real estate has been attempted to be devised by a will under the old law, not executed so as to pass it, and by the same will a legacy is given to the heir, without there is an express condition to that effect. Nor does the doctrine hold where the devise of the land is invalid by reason of incapacity to devise on account of infancy or coverture; but it was doubtful, in cases coming within the old law of wills, whether the testator by attempting to devise after-acquired real estate raised a case of election against the heir.(*p*)

This doctrine does not, however, prevent a person claiming by the will from enjoying a derivative interest to which he is entitled at law under a legal estate taken by another in opposition to the will, and therefore a

(*m*) 1 Swanst. 425, note (*a*).
(*o*) Sto. 1082-1094.
(*n*) 1 Vict. c. 26.
(*p*) Wms. Exs. 1238; J. W. 390.

man can be tenant by curtesy of an estate held by his wife in opposition to the will under which he accepts a benefit.

Creditors also are allowed to take the benefit of a devise for payment of debts, and also to enforce their legal claim against other property disposed of by the will.(q)

In the civil law, election against a will appears to have occasioned a forfeiture of the whole of the benefit intended for the person so electing; but in equity, it seems that where the value of the gift exceeds that of the person's own property or interest, the person electing against the instrument is only obliged to compensate the other to the amount in value of that whereof he has been disappointed.(r)

[*162] Previous to the alteration of the law by the recent act respecting *dower,(s) a widow was not excluded of her legal right to dower without there was an express declaration to that effect, or it clearly appeared from the whole frame of the will that the testator intended to give her some interest wholly inconsistent with the enjoyment of her legal right; but now, with respect to marriages since 1st January, 1834, unless a contrary intention appears by the will, the widow is not entitled to dower out of any land of the husband, if he devises for her benefit any estate or interest in land of which, if not devised, she would be dowable; but gifts of personalty, or of property, not liable to dower, will not prejudice her legal right, unless a contrary intention is declared by the will.(t)

Without it is fairly inferable from the nature of the different benefits, or from the instrument, that all should be taken or rejected,(u) a person may elect against a will as to one benefit, without being precluded from taking another under the same will;(x) but where property is given upon a condition to do something, if the gift is accepted, the condition must be performed, although it might be to pay debts or moneys of greater value than the property, for *qui sentit commodum sentire debet et onus*, and the converse also holds.(y)

A debtor against whom a creditor has several remedies cannot compel the creditor to elect between them, unless some peculiar equity arises from other circumstances, and a mortgagee may generally bring his action for the money, ejectment for the property, and suit for foreclosure or sale at the same time.(z)

A party bound to elect is allowed first to know all the circumstances of the case, and the value of the properties in question, and for that purpose can maintain a suit to have all necessary accounts taken; and an election under a misconception of the extent of claims on the fund elected, is not conclusive. An election may be express or implied, and

[*163] what *constitutes the latter is decided rather by the circumstances of each case, than by any general principle, the question being whether the parties acting or acquiescing were aware of their rights? whether they intended election? whether they can restore those

(q) Wms. Exs. 1237.
(s) 3 & 4 Will. 4, c. 105.
(u) Wms. Exs. 1242.
(y) B. L. M. 557; 4 Russ. 478.
(r) Sto. 1085.
(t) Ibid. ss. 9, 10, 14; Wms. Exs. 1239.
(x) Sto. 1091.
(z) Sto. 640; and see "Mortgages."

affected by their claim to the same situation as if the acts had never been performed? or whether lapse of time has precluded such inquiries?(a)

*CHAPTER V. [*164]

MORTGAGES AND OTHER INCUMBRANCES.

THE term *Mortgage* is generally used for any conveyance of land or other property, made by way of pledge for securing the payment of money and interest; though in strictness it is confined to a conveyance of property in fee, for a term or otherwise, with a condition or proviso for defeating the estate granted on payment of a certain sum on a day named; and such security is called a *mortuum vadium*, dead pledge, or mortgage; because at law, on breach of condition by non-payment on the day named, the estate is lost, or becomes dead, to the grantor; and on performance of the condition it becomes lost or dead to the mortgagee. However, besides this mode of security, there are various others, the most frequent of which is made by a conveyance of property to the debtor to hold until he shall repay himself principal, interest and expenses out of the profits of the estate. This was designated a *vivum vadium*, or live pledge, in contradiction to a mortgage, or dead pledge; because there was no proviso for defeating the estate. Similar to this was the security called a Welch mortgage, which closely resembles a conditional sale, and is as a conveyance of an estate, subject to redemption at any time on payment of the debt simply, the grantee being let into immediate possession, and permitted to take the profits in lieu of interest;(aa) and in equity every instrument transferring property, if originally intended by the parties as a security for money, or for any liability, is considered a mortgage; and parol evidence has in various cases, such as where there has been fraud, accident or mistake, been admitted to *show that a conveyance, [*165] though apparently absolute, was intended merely as a security.(b)

Mortgages, however, must not be confounded with conditional settlements and purchases; for although the line of demarcation is narrow, and equity will never allow that which was intended as a security to be taken as an absolute conveyance; yet, whenever it is manifest that the original and primary intention was not to create a security, but a conditional settlement or purchase, and that the estate should go according to the uses of the deed, subject only to a power in the grantor of defeating it on payment of a stipulated sum, there is no rule of law or equity preventing the grantee from requiring the strict performance of the condition by the grantor, if he wishes to avail himself of it, and retake the estate.(c)

With respect to a *vivum vadium*, as the estate ceases as soon as the

(a) Wms. Exs. 1243.
(b) Sto. 1018.
(aa) 5 J. & B. 96.
(c) 5 J. & B. 84.

debt is paid, relief is seldom sought in equity, except for the purpose of obtaining an account of the profits of the estate, or for a sale of the property; and with respect to a Welch mortgage, equity will, if the rents are excessive, frequently treat it as a common mortgage, and not allow the mortgagee to retain the whole rents and profits in lieu of interest, but make him account therefor.

The person making the security is styled the *mortgagor*, and the person taking it the *mortgagee*, and the estate in equity is considered as a mere security for the debt; and such debt is not considered in its nature real, but personal, even when there is no agreement by the mortgagor to repay it.(*d*) So that on the death of the mortgagor, the person taking the estate is entitled, if there is sufficient personalty, to have it paid thereout;(*e*) and where the security is under seal, it is looked upon in the nature of a specialty debt.

In case default is made in payment on the day appointed for the purpose, the estate is at law completely lost by the mortgagor, and the mortgagee thereupon becomes the absolute owner at law, so that he can obtain [*166] possession of the property *(except as against lessees claiming prior to the mortgage,) and maintain ejectment for such purpose, and can make leases of any duration, and otherwise act as with his own property, and the estate on his death descends or goes as if completely his. In equity, however, the mortgagee is treated as having no such ownership, but as a trustee for the mortgagor, who, after giving six months notice, is allowed, provided the estate has not become forfeited also in equity by lapse of time or otherwise, to redeem (that is have back) his estate on payment to the mortgagee of what is really due for principal, interest, and costs necessarily incurred, and this right is so inseparably connected with a mortgage, that it cannot be defeated even by an express agreement, according to the maxim "once a mortgage always a mortgage;"(*f*) nor can any collateral benefit be reserved to the mortgagee, as consequential on non-payment of the money, not even permission to a solicitor or other, being mortgagee, to make the usual charges in his business respecting the mortgaged property, although an agreement for a further security on non-payment, or for giving the mortgagor the benefit of pre-emption, in case the mortgagor should wish to sell, is valid;(*g*) and a *bonâ fide* purchase by the mortgagee, or a release to him of the right of redemption, provided it is fair and reasonable, will be upheld; and this right of the mortgagor gives him an equitable estate in the property, which descends or passes as the property would have done if not mortgaged, and can be granted, devised, and entailed, and if entailed might have been barred by fine or recovery, and now by a conveyance under the act of 3 & 4 Will. IV. c. 74, it is also subject to curtesy and likewise to dower in favour of women, married since 1st January, 1834,(*h*) and can only be barred by release, lapse of time, or decree of equity, except in cases under the 4 & 5 W. & M. c. 16, which enacts that if a person mortgages his property without giving written notice of a prior voluntary judgment, or of a prior mortgage, and does not in the case of

(*d*) 5 J. & B. 100. (*e*) See p. 142. (*f*) 5 J. & B. 80.
(*g*) Ibid. 83. (*h*) 3 & 4 Will. 4, c. 105, s. 2.

such judgment pay it off within six months after being required, he loses his right of redemption as against the *after or second mort- [*167] gagee;(i) the equity of redemption, however, cannot be taken under an elegit, although in equity it is chargeable with judgments against the mortgagor. The mortgagor is not, however, entitled to the possession of the property, unless there is a special agreement to that effect, but if he retains possession, he does so solely at the will of the mortgagee, who, without giving any notice, may at any time recover the same by ejectment against him, or such of his tenants as became so subsequent to the mortgage; but so long as he continues in possession by the permission of the mortgagee, he is entitled to receive the rents and profits without rendering any account whatever to the mortgagee, although he will not be allowed to do anything which may diminish the mortgage security. Not only the mortgagor, his assigns and representatives, but also all persons having a legal or equitable interest or lien on the property are entitled to redeem the mortgage, so that they may be enabled duly to enforce their rights, as for example, a tenant for life, or by the curtesy, or a jointress, and a tenant in dower in some cases, a remainderman, a reversioner, a tenant by elegit, a judgment creditor, and many others, and these, when they redeem, become entitled to the rights and remedies of the original mortgagee. A mere annuitant of the mortgagor, however, who has no interest in the land, cannot redeem.(k)

At any time after default has been made in paying the money, the mortgagee is entitled to proceed in equity by bill or claim for the purpose of foreclosing or barring the mortgagor and those claiming under or through him any interest in the property, unless they think proper to discharge the mortgagee's claim for principal, interest and costs; and in such proceedings a decree will generally be made, that if the parties claiming subject to the mortgage do not redeem by paying the amount of principal, interest and costs within a limited time (generally six months, and which on special grounds will be enlarged,) they shall be absolutely barred and foreclosed from all right to the property, and then on non-payment *at the appointed time the mortgagee becomes [*168] absolute owner in equity as well as at law, without there are interests prior to his mortgage, in which case he can generally, if he thinks proper, redeem such interests.

Foreclosure is deemed the appropriate equitable remedy for non-payment of the mortgage money; but although it seems a sale under the direction of the court cannot be decreed except as to Irish property, against the will of the mortgagee,(l) such a sale, instead of foreclosure, can, it appears, be decreed against the will of the mortgagor in the following cases; namely, where there is a power of sale in the mortgage deed, or the property is insufficient, or the mortgagor is dead and there is a deficiency of personalty, or the estate has decended on an infant heir, or the mortgagor is a bankrupt or an insolvent, or the mortgage is of an advowson of a dry reversion, or is purely equitable, or the property by

(i) 5 J. & B. 456.
(k) Sto. 1023.
(l) 20 L. J. (Eq.) 530; sale permitted by 15 & 16 Vict. c. 86, s. 48.

the local law (as Ireland) is liable to a sale.(*m*) The reasons for these exceptions (except the last) is not very apparent, and it has therefore been thought by some that a sale may ordinarily be had if the mortgagee wishes it;(*n*) and in many cases a sale would act more equitably than a foreclosure, for then if there is a surplus the mortgagor would be entitled to it; and if a deficiency, the mortgagee could pursue his other remedies for such deficiency, which, after a foreclosure, he cannot do without allowing the mortgagor to come in and redeem; and therefore if he sells or otherwise disposes of the property foreclosed, so as to prevent the foreclosure being opened, he will be considered as having accepted the property in lieu of the money which was thereby secured.(*o*)

Besides the right of foreclosure or sale, and the right of recovering the property by ejectment against the mortgagor and his tenants subsequent to the mortgage, and receiving the rent from the anterior tenants, the mortgagee can bring an action at law against the mortgagor on his covenant in the mortgage deed for the amount due, and he may at one [*169] *and the same time pursue his several remedies against the mortgagor and the property; nor will the fact of his having taken the debtor in execution prejudice his remedy against the property, and where the security is scanty, the mortgagee should, before proceeding for a foreclosure, make the most of his personal remedies against the mortgagor, as by suing at law for the money, and then resort to the property for the remainder (if any,) of the debt.(*p*)

Until the equity of redemption is released or barred, the mortgagee cannot do any thing injurious to the property, either by cutting down timber (except where necessary,) committing waste or otherwise; he, however, can avoid any leases which the mortgagor has subsequently to the mortgage made without his consent (either implied or expressed,) and can let the estate from year to year, although he is not allowed in equity to grant leases for a longer duration binding against the mortgagor after redemption, without they are necessary or very beneficial to the property, or there is a special power for such purpose in the mortgage deed. And a mortgagee who holds possession, or receipt of the rents and profits, will be obliged, as well as a tenant by *elegit*, so long as the mortgagor's right of redemption exists, to account for every kind of profit that he has, or with due diligence could have made, and should always keep his accounts so that they may at any time be produced to the mortgagor.(*q*) A legal mortgagee, being assignee of the property, can distrain or otherwise recover the rent from such tenants as were let into possession *previously* to the mortgage, but he cannot distrain on those tenants which the mortgagor has let in *since*,(*r*) although he may recover the back rents as *mesne* profits after a recovery in ejectment, and perhaps also in an action for use and occupation, if the tenant after notice refuses to pay; and though such a tenant cannot defend himself in an action for use and occupation brought by the mortgagor, by pleading the mortgage

(*m*) Sto. 1026.
(*n*) 5 J. & B. 406.
(*o*) 15 L. J. (Eq.) 347; 5 J. & B. 405.
(*p*) 5 J. & B. 405.
(*q*) Sto. 510-1016.
(*r*) 8 L. J. (Q. B.) 51; 13 L. J. (Q. B.) 142.

and notice from the mortgagee to pay him, still it seems *that a payment of rent to the mortgagee would be a good defence.(s) [*170]

Besides those mortgages which are created by formal instruments, and operate at law as well as in equity, there are others called *equitable*, which arise from some writing showing an intention of making a security, or simply from a deposit of title deeds; and any writing from which such an intention can be gathered with certainty, is sufficient to give the creditor a right in equity to a proper assurance by way of security, or a sale, or foreclosure. And a mere *deposit* of deeds for securing money, even without any writing, is looked upon as an equitable mortgage, because the deposit gives the creditor a lien on such deeds, so that the debtor cannot, either at law or in equity, recover them back without paying the amount for which they were deposited, and therefore equity will not consider the Statute of Frauds as preventing parol proof of what they were deposited for, but will enforce such lien by directing a sale of the property. The deposit of the deeds must, however, be at the time of the loan, or with the intention of securing money already due; and a mere deposit simply with a view to prepare a future mortgage, will not, it seems, even if the money is afterwards advanced without a proper mortgage being given, be deemed an equitable mortgage; and the mere possession by a bond creditor of the title deeds will not of itself give him any lien thereon as equitable mortgagee,(t) although in the case of a simple contract creditor it might be otherwise. The deposit must be with the creditor or some one in trust for him; and although it is not quite clear whether a deposit without writing can be made with a person in trust for the creditor, at all events it seems clear that a deposit cannot, without writing, extend to secure a debt due to the depositee and another.(u) It is not necessary that all the title deeds should be deposited,(v) at least if the conveyance to the depositor is deposited, and a deposit will extend to future advances if it can be shown by parol or written evidence that such was the intention, while a legal mortgage would not thus *extend without an agreement in writing;(x) although in cases of [*171] deposit, a written agreement as before stated is not necessary, it is always advisable, as affording better evidence of the transaction; and in cases of bankruptcy, the mortgagee will not otherwise be allowed his costs of obtaining an order of sale.(y)

A mortgage of property, which has antecedently been mortgaged for the whole of the debtor's estate therein, is also, strictly, an equitable mortgage, for it passes no *legal* interest, and simply gives such subsequent mortgagee a right in equity over the property. A subsequent incumbrancer, who advances his money without notice of a prior one, can obtain priority by obtaining a conveyance to himself, or to a trustee, of the legal estate; for the equities between the two claimants being equal, the legal estate will prevail; an acquisition, however, of such an estate (after notice of a prior incumbrance) from assignees of a bankrupt mortgagor, although there may have been no notice at the time of the loan, will

(s) 21 L. J. (Q. B.) 60.
(t) 20 L. J. (Eq.) 465.
(u) 5 J. & B. 113.
(v) See 16 L. J. 18.
(x) 5 J. & B. 122.
(y) Ibid. 124.

not give priority, for the legal estate was held by the assignees affected with a trust for the first mortgagee,(z) nor will the legal estate avail if the subsequent mortgagee acquired it in *autre droit;* and, where neither of the mortgagees have the legal estate, the first, according to the maxim *qui prior est in tempore fortior est in re,* will have priority. Where there are two or more mortgages on the same property, the equitable doctrine of *tacking,* which has arisen from the rule, "that where the equities are equal the law must prevail," is frequently used most advantageously by the party having such right; for, by the doctrine in question, a third or latter mortgagee, who, after having *advanced his money* and obtained a security on the property *without notice* of a second or other intervening incumbrancer, purchases the first legal mortgage, statute, judgment or recognizance (even after notice of the intermediate incumbrance,) so as to acquire the legal title, and hold both securities in his own right, will be allowed in equity to tack both incumbrances [*172] together and squeeze out the intermediate *ones, so that the first cannot be redeemed without redeeming the third also. This right, however, only attaches where the amount desired to be tacked was by agreement betwen the parties secured on the property, and is not therefore allowed to puisne creditors by judgment, statute, or recognizance.(a)

A legal mortgagee will also be allowed, against future incumbrances, to tack any money due to him which *before notice* of such other incumbrances has been distinctly charged or advanced on security of the property; if, however, the money was not charged or advanced on the security of the property, but is merely a bond debt or other personal liability, the first mortgagee is not permitted to tack it against any incumbrancer of a superior rank to such bond, nor against other specialty creditors, nor even the mortgagor himself, but only against his heir, to prevent circuity of action;(b) and although only six years, interest can be recovered against the land, at least as between several incumbrancers,(c) yet where there is a covenant for the payment of the interest of the mortgage money, and the mortgagor is dead, twenty years' interest, if due, can, by means of the doctrine of tacking, be recovered against the heir or other volunteer taking the mortgaged property.(d) A subsequent mortgagee, by giving notice to the first, will prevent the first mortgagee from being able to postpone him by any further advance on the estate, but will not prevent a third mortgagee, who advances money on the property without notice of the intervening one, from buying up the first mortgage and obtaining priority over the second; such a notice, however, should never be omitted, for it is often the means of giving notice to third mortgagees, it being the practice to inquire of the first mortgagee before accepting the security.(e)

The omission, by a mortgagee who has the legal estate, to obtain and [*173] keep possession of the title deeds, will not postpone *him to a person who advances money upon such deeds, or otherwise obtains an equitable right to the property, without he had been guilty of fraud

(z) 16 L. J. (Eq.) 430-470. (a) Sto. 412. (b) Ibid. 418.
(c) Page 32. (d) Per V. C. Parker, 25th Feb. 1852.
(e) Sto. 412-421.

or gross and wilful negligence in not obtaining or retaining them; and equity will not impute such fraud or negligence if there has been a *bonâ fide* inquiry after the deeds, and a reasonable excuse for non-delivery of them, but such will be imputed if there has been no inquiry, and so there must be some good excuse given where the deeds have been parted with.(*f*) Where the mortgagee has the freehold, he can at law (except where they were parted with before his mortgage) generally recover the title deeds or damages for their detention, although equity will not assist him in doing so; if, however, the advance and deposit was before his mortgage, and he had notice, he will be postponed and be restrained from recovering the deeds.(*g*) Notwithstanding the rule, that notice to the solicitor is notice to the client, a mortgagee will not be considered as having constructive notice that a prior charge on the property has been made by such mortgagor, though the fact, is so, and the mortgagor has acted as a solicitor for the mortgagee.(*h*)

Where there are two distinct mortgages on different estates by the same mortgagor to the same mortgagee, neither the mortgagor, nor his heirs or assigns of both or either of such estates, can redeem the one without the other, because he who seeks equity must do equity; and the rule is the same where one mortgage is of real and the other of personal property, and also where a person mortgages an estate and then purchases another in mortgage to his mortgagee. It is not, however clear, whether this rule applies to mortgages orignally made to different parties, which have become united in the same party, although it does not apply without both mortgages have become redeemable, nor if it would prejudice third persons who do not claim under the mortgagor;(*i*) nor is the rule *applicable where the mortgagee attempts to foreclose or to obtain an order in equity or bankruptcy for sale. [*174]

With respect to *judgments*, they did not formerly give a right to the land, but only a *lien* thereon; but now by the 1 & 2 Vict. c. 110, (except as regards purchasers, mortgagees, or creditors before the act,) if properly registered,(*k*) they operate immediately upon being entered up as a *charge* upon all real estate (including copyhold and customary,) whether legal, equitable, or such as the debtor can without another's consent dispose of for his benefit, and are binding against him and all claiming under him after such judgments, and also his issue, and others he might bar without another's assent; and the creditor is given the same remedies against the property so charged as if the debtor had by writing agreed to charge the same with the debt, and interest at four per cent. (s. 17,) and had power so to do; but no proceedings (except for the protection of the property)(*l*) can be taken until the lapse of one year from the entering up of the judgment, and no preference is to be had, in case of the debtor's bankruptcy, till after such year (s. 13;) and by the fourteenth section, judgment creditors can obtain charging orders against government stock, or any shares of public companies, belonging to the debtor, which entitles the debtor to like remedies after six calender months; and

(*f*) 21 L. J. 67.
(*g*) 5 J. & B. 480-483; 17 L. J. (Eq.) 753.
(*h*) 21 L. J. 69.
(*i*) 5 J. & B. 436-438.
(*k*) 2 Vict. c. 11.
(*l*) 20 L. J. (Eq.) 659.

decrees and orders of the Court of Chancery have the same effect as judgments (s. 18;) the caption, however, of the debtor, although it does not discharge a mortgage security, will discharge the security given by the act, if not realized (s. 16.) The charge under the act will not affect purchasers, mortgagees, or creditors, without notice,(*m*) further than the lien did before the 1 & 2 Vict. c. 110, so that in such case, as against purchasers and others claiming for value, the judgment creditor can only make a claim upon half of the freehold property, which claim is defeated if the purchaser, &c., takes under a power of appointment created antecedent to the judgment, or by getting in an outstanding legal estate; and if the property is copyhold the judgment, it seems, will not affect it, [*175] *and if leasehold, only if execution was in the hands of the sheriff before the purchase; and if the judgment has not been registered, purchasers and others claiming for value will not be affected at all, unless they have notice, and then, it seems, only in equity to the amount of half the freeholds, and not as to other property.(*n*)

Besides mortgages on lands and tenements, there are also frequently both legal and equitable mortgages on *personal property;* very similar observations apply to these, and in most cases there must be some delivery and retention of possession, or notice given, to prevent the mortgage being defeated by the bankruptcy or insolvency of the mortgagor. And in mortgages of *choses in action* it seems that the incumbrancer first giving notice to the person liable to pay or deliver over the subject of the mortgage, or to the trustee thereof, obtains priority.(*o*)

There are also *pledges*, which differ from mortgages, in that they do not pass the property, but only the possession, or, at most, a special property in the goods to the pledgee, with a right of retainer till payment of the debt, or fulfilment of the engagement. With respect both to mortgages of personal property and pledges, a suit can be instituted, after the time for payment has elapsed, to foreclose, or even to sell, at least where a sale cannot be satisfactorily made except with the court's assistance. It seems also that, after due notice, a sale can be made for the purpose of payment without the delay and expense of such a suit; at least with respect to goods, which are generally purchasable, for in such case, similar goods of the same worth and quality can be purchased for a sum equal to the sale moneys.(*p*) Before, however, the property has been sold or foreclosed, it can be redeemed by the debtor, his representatives, or assigns, even if the time mentioned for such purpose is passed, provided application is made within reasonable time. This remedy, how- [*176] ever, in the *case of pledges, in consequence of the right of property remaining vested in the debtor, is frequently attainable, without recourse to equity, by an action at law of detenue or trover, after a payment or tender of the amount due, unless some special circumstances, as the necessity of an account or discovery, or of a re-assignment of the property, renders the assistance of equity requisite.(*q*)

(*m*) S. V. & P. 664, 965.
(*n*) 5 J. & B. 64 b., 27; Shelf. R. P. 503-521; 2 & 3 Vict. c. 11; 3 & 4 Vict. c. 82; see 18 Vict. c. 15, s. 4.
(*o*) See J. & B. 261; 17 L. J. (Ex.) 219.
(*p*) Sto. 1031.
(*q*) Ibid. 1032.

A *lien* is a right which a person has to retain property until a demand is satisfied, and is either *special*, as for a particular debt, or *general*, for several debts; the first is of frequent occurrence. Thus all persons who by work alter, or improve, or ascertain the value of property which the owner has delivered to them for such purpose, have a special lien for their charges in the transaction, but not generally for any other debt that is owed them. Some persons, however, have by law, or the usage, of trade, a lien, not only for the amount of their charges, but also a general lien for other debts due to them for work or business done by them in their particular calling, as attorneys, factors, wharfingers, packers, calico printers, insurance brokers, and bankers.(*r*) Liens, though they give the holder a right to retain the property till the amount due is discharged, give no power of disposal, and such right of retention is generally subject to all the rights, legal and equitable, which the property was liable to at the time of the accrual of the lien, whether there was or not notice of such rights.(*s*) The lien which a vendor has for his unpaid purchase-money has been before considered under the head of constructive trusts.(*t*)

The doctrine of *marshalling*, which has been before referred to in treating of the administration of assets,(*u*) frequently also arises respecting mortgages and other charges on property; the general rule being, that if one has a lien on, or interest in, two funds for a debt, and another in one only of such funds for another debt, and the claims of both cannot be satisfied, if the first creditor resorts to the fund wherein alone *the latter is interested, then the latter, except where it would operate to the other's prejudice, is allowed in equity to call on [*177] the former to resort to the other fund in the first place, or if he will not, is permitted to stand in his place against the fund in which the latter had originally no right.(*x*) This marshalling, however, only arises where the securities are from one and the same common debtor, and not where two or more persons are under a joint obligation to one creditor, and one of them is indebted to another creditor, unless it appears that the debt ought in reality to be paid by the one who is only jointly indebted, or that there is some supervening equity.(*y*)

A *principal*, in the absence of any express engagement, is liable, both at law and in equity, to indemnify his *surety* against all losses or expenses he may incur in that character; but such liability, even in equity, is only treated as a *simple contract* debt, notwithstanding the loss occasioned to the surety was by virtue of an instrument under seal, as, for example, a bond or other specialty. The surety, however, on paying the claim is in equity entitled, for the purpose of his indemnity, to the benefit both of the securities taken by any of the co-sureties, and of those possessed by the creditor, whether of a legal or equitable nature, other than the original principal security whereby the debt was created, as, for example, the bond or covenant for payment; for by the payment of the amount secured, such principal security became satisfied and extinct, and the debtor consequently is enabled, in case of an action being afterwards brought against

(*r*) 5 J. & B. 1. (*s*) 21 L. J. (Eq.) 105. (*t*) Page 93.
(*u*) Page 145. (*x*) Sto. 633, 634. (*y*) Ibid. 642-645.

him in the creditor's name, to plead payment. An assignment, therefore, would be useless, and in fact there is, after payment, nothing left to assign. Thus if the debt is secured by a bond of the debtor and surety, and a mortgage by the debtor, if the surety pays, the bond is satisfied, and cannot be further proceeded upon; but the surety will be entitled to the benefit of the mortgage, and to stand in the creditor's place, and hold the mortgaged property until payment; and, for the same reason [*178] that the surety cannot obtain the benefit of a bond, he *cannot of a judgment, payment satisfying it.(z) If, however, the creditor, on payment, is willing to make an assignment of a bond, judgment, or other similar security, the extinguishment or satisfaction of the debt can be prevented by some one on the surety's behalf *purchasing* the security at the amount which is due, and thereupon obtaining an assignment, with a power of attorney from the creditor, for then the debt remains, and the trustee will be enabled at law to sue on the security in the creditor's name; and in bankruptcy, the surety who has paid the debt is allowed to stand in the place of the creditor in respect to proof, dividends, and other matters.(a) It may be here added that a creditor is entitled to the benefit of any counter-bond or security which the surety has received from the principal; and such creditor is allowed in equity to make such bond or security available for the payment of his debts.(b)

[*179] *CHAPTER VI.

APPORTIONMENT AND CONTRIBUTION.

In numerous cases of account, necessity for *apportionment and contribution* occurs, arising either from some implied contract or some general principle of justice.(aa) Frequently relief is obtainable at law, but even in such kind of cases resort must often be made to equity for the purpose of avoiding a failure of justice, or a multiplicity of suits; for where there are several persons, each is only liable at law to contribute for his own portion, even though the others, or some of them, from insolvency or otherwise, cannot contribute anything, and separate actions and verdicts are requisite against each; while in equity contribution can be obtained from all in one suit, and if any of the several persons liable are, by insolvency, bankruptcy, or otherwise, unable to contribute, the amount will be equally apportioned among those who can pay, without there are special circumstances making some liable for a greater or lesser proportion than the others; and further, where a party primarily liable has a right over against another, such latter can frequently be reached in the same suit.(bb)

An *apportionment* may be not only of an incumbrance, loss, expense

(z) Sto. 499 et seq.
(b) Sto. 502.
(bb) Ibid. 477, 493-496; 3 J. & B. 291.
(a) 12 & 13 Vict. c. 106, ss. 73-76.
(aa) Ibid. 477, n.

or liability, but also of a benefit; and in the case of an apportionment of the former class, a like contribution, consequent thereon, is enforced. Contribution cannot generally be obtained at law of a *tort*, but is sometimes compelled of a *contract* or *quasi* contract. A contract, however, relating to a particular thing or matter can seldom be apportioned, for it is generally considered entire and indivisible. Thus, where a mate was engaged for a voyage at £30 and died during it, his representatives were allowed nothing at law, nor it seems would they have [*180] been in equity.(c)

Interest, in consequence of its accruing from day to day, has always been apportionable, but previous to the recent acts on the subject, neither dividends, annuities, or other *periodical payments*, with the exception of an annuity settled by a man on his wife for separate maintenance, and payments for the maintenance of daughters previously to the receipt of their portions, were apportionable as to time, without an express provision, and consequently no apportionment was made between a tenant for life and a remainderman; but now, by statute, *rents* payable on any demise or lease of lands or hereditaments, which determines by death previously to the rent day, are made apportionable, and all *continuing* rent-services on leases, and all rent-charges, and other rents, annuities, pensions, dividends, moduses, compositions, and other *payments* payable *at fixed times*, under any instrument made or coming into operation after the 16th of June, 1834, are, on the determination of the interest of any person entitled, made apportionable, except when it is otherwise provided, or they are annual sums made payable under policies of insurance.(d) Rent, therefore, is now apportioned between the real and personal representatives, if the lease was in writing and since the time named in the act.(e) A parol letting, however, seems sufficient in cases between tenants for life and remaindermen.(f) The act of Will. IV. does not it seems extend to annuities or other payments which determine by the death of the *cestui que vie*.(g) The recent statute of 14 & 15 Vict. c. 25, whereby tenants of persons entitled for life, or other uncertain interest, are allowed to continue their farms or lands till the end of the current year, makes such tenants liable for a fair proportion of rent to the new owner of the property. An apportionment will not be made where the landlord has evicted the tenant, or has accepted a surrender from him in the middle of the quarter or *half year, and it is doubtful [*181] whether the landlord, even where the eviction is by title paramount, can recover a proportion of the rent for the time of occupation.(h) Rent, however, is apportionable with respect to the *corpus* of the land, and therefore if a lessee is evicted from part of the land, or part of the subject of the demise fails, an apportionment can be had; and so when the property demised descends to different heirs, as in the case of gavelkind lands, or a descent among daughters, or where part goes to the customary and part to the common law heir;(i) but it is not

(c) Sto. 470, 471 a.
(d) 11 Geo. 2, c. 19; 4 & 5 Will. 4, c. 22.
(e) 4 M. & Cr. 484; see *contra*, 21 L. J. (C. P.) 124.
(f) Shelf. R. P. 473.
(g) 9 J. & B. 478; 4 J. & B. 345.
(h) 4 J. & B. 339.
(i) Ibid. 335, 336.

apportionable as against the lessee, on the lessor's alienation, although, on the lessee's, the alienee will be liable to a fair proportion. Respecting conditions of re-entry, they are generally considered entire and indivisible, except when the reversion becomes severed by the act of the law, or the condition is severed by the act or wrong of the lessee.(*k*)

In the case of an articled clerk, if the master dies, even leaving a surviving partner who can and is willing to continue such clerk in his articles, equity will decree an apportionment of the premium paid; and so in case of apprenticeship fees, if the master becomes bankrupt or insolvent, or otherwise unable to carry on his business, an apportionment is decreed; also where portions are given to daughters so as to be payable on their attaining their majority or previously marrying, and maintenance is directed to be paid at stated periods in the interval, such daughters as attain their age or marry between the periods at which such maintenance is payable, will generally be entitled in equity to a fair proportion, calculated for the time which has elapsed since the last payment.(*l*)

In some few of the above cases, where the rent or other payment is apportioned among those benefited by it, there is a corresponding apportionment of the amount payable, in favour of the persons liable, as where the tenant is evicted of part of the land, for then such tenant will have only to pay a fair proportion for such land as he retains; and so where [*182] the property *passes by assignment into the hands of several tenants, such tenants will be only *personally* liable for their proper proportion, though each distinct portion of the land may, as it generally is, be still liable to be distrained upon for the whole rent reserved by the original lease; and in further illustration of the apportionment of a *liability*, if the owner of a *rent-service* become entitled to the actual possession of part of the property out of which it issues, an apportionment arises, so that only a fair proportion may be paid by the lessee of the other portion of the property; but if a person entitled to a *rent-charge* purchases part of the land charged, and has the same conveyed to himself and not to a trustee, an extinguishment of the whole takes place.(*m*)

And with respect to an apportionment of and contribution towards an *incumbrance or expense*, if several persons become possessed by purchase, descent or otherwise, of different parts or interests in an estate which is charged with a judgment, mortgage, lien or other incumbrance, each will be obliged to contribute proportionably to his estate in keeping down the interest or paying off the incumbrance, and if one is compelled to pay the creditor the whole amount, he can call upon the others for contribution.(*n*) In case of a *compulsory discharge* of an incumbrance, the modern rule is, that a person having a limited estate, as a tenant for life, in the property charged, must contribute beyond the interest, in proportion, according to his age and the value of his estate, to the advantage he obtains from the discharge and the cessation of interest, and if the property is sold for satisfying the incumbrance, the income of what remains after such satisfaction belongs to the party having the limited estate, and in succession to any other persons having limited estates, and the first person

(*k*) 4 J. & B. 338.
(*l*) Sto. 472-478; 18 L. J. (Eq.) 308.
(*m*) Sto. 475 a.
(*n*) Ibid. 476, 485.

absolutely entitled will take the capital subject to such prior estates; while if the tenant for life and remainderman or reversioner sell the estate without agreeing how the purchase-money is to be divided, each, it seems, is entitled to a share upon a calculation of the value of their interests, according to the probabilities *of life.(o) Parties having limited estates, such as tenants for years and life, and those [*183] in tail who cannot bar the entail (as after possibility of issue extinct,) and also guardians of infant tenants in tail, are obliged to keep down the *interest* of incumbrances, if the income of the property is sufficient, and they can be compelled so to do by the parties entitled after them; but a tenant in tail in possessson, who is of full age and can bar the entail, cannot, any more than a person having an absolute interest, be so compelled, for he can make himself absolute owner of the estate. If, however, such tenant in tail pay the interest, his executors or administrators cannot claim the amount against the property; so if such a tenant in tail *pay* off *an incumbrance*, it is generally considered an extinguishment, and the person next entitled cannot be required to contribute unless such incumbrance has been kept alive by assignment, or it is otherwise clear that such tenant intended to make himself a creditor of the property in the place of the incumbrancer. The like doctrine, however, is inapplicable to a tenant for life or years, or a tenant in tail, who cannot bar the entail, or one in remainder, whose estate may altogether be defeated; for then the presumption that he intended to clear the property does not arise, but on the contrary that he simply meant to put himself in the place of the incumbrancer. In all the above cases, however, the presumption, whether in favour of a discharge or not, can be rebutted by circumstances which show a contrary intention.(p)

Apportionment frequently arises in respect of an *expense* in cases where the *renewal* of leasehold property becomes necessary, and in the absence of any express or definite direction, the modern rule is, to apportion the expenses for the renewal between the tenant for life and the remainderman according to their respective interests in the property, that is, in proportion to the *actual* enjoyment they have of the renewed lease; and there is apparently no distinction in this respect between leases for years and for lives, though there is less difficulty in case of the renewal of the one than of the other, for the time *and frequently the expense of the renewal of a term of years is known.(q) [*184]

Contribution as to liability and expense also frequently arises between *sureties*, and though it was formerly doubtful whether such could be enforced at law, unless founded on some positive contract between them, it is now clear that it can both at law and in equity, it being considered that such right is founded, not so much on any implied or express contract, but on the broad and general principle of justice, that there should be an equality of burden and benefit; and therefore if a surety, on default of the principal is obliged to pay the whole debt, or to perform an obligation for which the whole are bound, he can compel his co-sureties to contribute, whether they are jointly and severally or only jointly or seve-

(o) Sto. 487, 488 a. (p) Ibid. 483-488. (q) 2 Sp. 545.

rally bound, and whether their suretyship arises under the same or a different instrument, and whether the sureties were known to each other or not, if such instruments are primary concurrent securities for the same debt, unless there is some implied or express contract to the contrary, as where one surety is intended only to be subsidiary to and a security for the others in case of default and not as a primary concurrent security, in which case the surety would not be liable to contribute towards the others. There is no remedy at law against the assets of a deceased surety, where his liability was only joint, for in such case it ceased with his death, and it is said that, as he was not benefited by giving the security, there is no equity which will enable this court to give any relief.(*r*) There is however some reason for saying that his assets ought to contribute to a co-surety, though they are not liable to the creditor, for otherwise the whole burden is thrown on survivors, who were not benefited at all. The several sureties will have to *contribute equally* without there is some express or implied contract to the contrary by which the quantum can be otherwise governed, as where the sureties are bound in different penalties, in which case they contribute according to such penalties, instead of *pari passu* in the ordinary way.(*s*)

[*185] *Contribution also will frequently be enforced against legatees or devisees on behalf of those who have been obliged to discharge the debts or liabilities of the deceased.(*t*)

So in cases of losses or expenses which are voluntarily incurred during a voyage for the general benefit, as by *jettison* (which is the throwing overboard of goods to lighten the ship,) or by any other loss or expenditure for the common benefit, a contribution called *general average* is enforced against all interested in the property saved, namely, the ship, the freight, and the cargo. The admiralty courts have various powers respecting these matters; but, as the ordinary courts of law could manifestly make no proper adjustment without a multiplicity of suits, the court of equity exercises herein a general jurisdiction.(*u*)

Contribution also frequently arises between *joint* tenants, tenants in common, *and part owners* of ships and other chattels, for all losses, charges and expenditure incurred for the general benefit; and where profits have been made an apportionment thereof also occurs.(*x*)

[*186] *CHAPTER VII.

PARTNERSHIP AND AGENCY.

In matters of *partnership* equity exercises theoretically a concurrent jurisdiction with the courts of law, and, practically, from the inadequacy of those courts to afford full relief, an exclusive jurisdiction in all cases of any complication or difficulty;(*a*) for although where a partnership

(*r*) Sto. 162; 3 J. & B. 276. (*s*) Sto. 497. (*t*) Ibid. 503.
(*u*) Ibid. 490, 491. (*x*) Ibid. 505; Sto. P. 579. (*a*) Sto. 683.

exists, and the articles of partnership are under seal, the proper remedy for any breach thereof is by an action of covenant, or where they are not under seal, or only by parol, then by assumpsit, and, where an account is desired, the action of account may be brought, yet such remedies are altogether inadequate to provide for many exigencies connected with partnerships; for, unless there is some agreement which can be proved, no action (except that of account) can be brought by the one partner against the other, and the action of account is so inconvenient that it has nearly become obsolete; and, further, it frequently happens, that from some controversy arising as to the fact of a partnership, or as to the parties constituting it, or from the want of a discovery or other peculiar equitable relief, no adequate remedy can be had except in this court.(*b*)

A partnership may be defined as a voluntary contract between two or more competent persons to place their money, effects, labour or skill, or a portion thereof, in lawful commerce or business, with the understanding that there shall be a communion of the net profits between them, and every partner is considered as an agent for the partnership in all matters relating thereto, though he differs from a mere agent in that he has a community of interest with the other partners in the *whole property, business and responsibility of the partnership.(*c*) [*187]

Partnerships have been divided into, first, *universal*, in which the partners agree to bring in all their property and employ themselves wholly for the benefit of each other; second, *general*, in which, properly, the partners carry on all their trade or business for each other's benefit, whether the capital stock is limited or not, or they contribute equally or not, this term, however, is generally applied to those partnerships in which all are engaged in a particular trade or business only; and third, *special*, in which some particular branch of trade or business, different from the general business or occupation of the partners or one of them, is carried on, including those which are usually called limited, from only extending to a single adventure or transaction. The *partners* are designated *ostensible*, or those who are and appear to the world as such; *nominal*, who are not, but appear to the world as such; and *dormant*, who do not appear as such but partake of the profits.(*d*)

A partnership may be either for a fixed period or during pleasure, and conditionally or not. When the duration is fixed, or the purpose of the partnership is such that it must continue for a particular period, it will continue accordingly if nothing occurs to previously determine it; but in other cases any partner can at his pleasure determine the partnership as to himself; and in such case, if the other partners agree to continue, a new partnership will be considered as arising between them on the old terms, as far as such can then apply, and have not been altered by agreement or the course of business.

Partnerships may be *dissolved* by effluxion of time, mutual agreement, operation of law, and by the decree of the Court of Chancery. In all these cases, however, the dissolution is not absolute until the whole partnership affairs have been wound up, for the connection must partially

(*b*) Sto. 660-663. (*c*) Sto. P. 1, 2. (*d*) Ibid. 100, 112.

[*188] continue for such *purpose.(e) *Death*, unless there is some express agreement to the contrary, works a dissolution; and so it seems does a *transfer* to a stranger of a partner's share, no matter whether voluntary or *invitum;* for as a partnership must be voluntary, the other partners cannot (except by previous agreement) be compelled to take the representative or assignee of one partner as a partner with themselves, nor can they compel him to become a partner, consequently *bankruptcy* and *insolvency* of one works a dissolution. A *change in* the *condition* of the partners will it seems also determine a partnership, such as outlawry, or a conviction and attainder for felony or treason; and so seemingly will a *war* between the countries of which the partners are subjects, except where they reside in a neutral country and there carry on the business, for as such war makes them enemies, they necessarily cannot act together.(f)

Where it becomes impracticable to carry on the business, at least in the manner which was agreed upon, or one of the partners becomes insane or permanently incapacitated, or guilty of gross (not trivial) misconduct, fraud or violation of duty, equity will dissolve the partnership before the regular time, and will in cases of fraud, imposition or oppression in the original agreement dissolve it even *ab initio*;(g) ond on the other hand where it is attempted in bad faith suddenly to dissolve a partnership which exists only at the will of the parties, equity will stop such a dissolution by injunction, if irreparable injury is otherwise likely to arise; and so it will also interpose to prevent a partner from doing any thing injurious to the partnership.(h)

When a dissolution has taken place, not only will an account be decreed, but, if necessary, a manager or receiver will be appointed to close the concern and sell the partnership effects; without, however, an actual or contemplated dissolution under which the affairs may be wound up, the court, although it has the power, is not in the habit of decreeing either [*189] an account or a manager except there are special *circumstances, such as that of a partner so misconducting himself as to endanger the business.(i)

All the partnership property is considered in equity as *personalty*, and as belonging to all according to their respective interests in the partnership; and all such interests are considered equal except there is some expressed or implied agreement to the contrary. For the above reason, real estate, no matter what may be the form of conveyance, will in equity, though not at law, go and be distributable to all intents and purposes as personal estate, so as to be subject, like other personalty, to all the equitable rights and liabilities of the partners and their creditors, and so as on the death of a partner to pass to his personal representatives and distributees, except perhaps where there appears a clear intention on his part that it shall be taken beneficially by his heir.(k)

The partnership creditors, until judgment, have at law no right to or over the partnership property, but in bankruptcy and in equity they are

(e) Sto. P. 384, 455; 7 J. & B. 80.
(f) Sto. P. 432, 455.
(g) Ibid. 412.
(h) Sto. 669.
(i) Ibid. 671, 672; 20 L. J. (Eq.) 585.
(k) Sto. 674.

generally considered as being entitled to have their debts paid out of the partnership funds in priority to the partner's private creditors; and the latter are given the priority out of the separate estate of their debtor, though at law a joint creditor can levy his execution directly against the separate estate Where, however, there is no joint estate, it is not clear whether in equity the joint creditors would not, in the same manner as in bankruptcy, be entitled to claim *pari passu* with the separate creditors.(*l*) And although at law the joint creditors have no right against the representatives of a deceased partner, they have in equity, and can proceed in the first instance against such representatives, leaving them to their remedy over against the other partners. It seems, however, that joint creditors cannot be compelled, as in bankruptcy, to resort to the estate of the deceased partner in order to benefit the separate creditors of the other partners.(*m*)

In matters of *agency* the Court of Chancery's adjustive jurisdiction is also largely exercised; for in most agencies, *especially those [*190] of attorneys, factors, bailiffs, receivers and stewards, there are mutual accounts between the parties; or if the account is on one side, as the relation naturally occasions a large confidence between the parties, the principal is seldom able, in case of controversy, to establish his rights, or to ascertain the true state of the accounts, without a discovery and inspection of the books and papers relating to the agency.(*n*)

Agents are required to keep proper and accurate accounts of their transactions, and to be ready at all reasonable times to give full information to their principals, and allow their accounts and vouchers to be duly inspected; and if, without some good reason, they omit to keep proper vouchers and correct accounts, they will not, it seems, be allowed the compensation which otherwise would belong to them. The agent also must not mix his principal's property with his own, and if he does so, must clearly show which is his own, and which is that of the party employing him, or the whole will be considered as belonging to the latter.(*o*)

Agents are not only responsible for a due account of all their principal's property, but also for all profits which they have clandestinely obtained by any improper use of such property; and in all matters they must act with the utmost good faith and openness towards their principals.(*p*)

*CHAPTER VIII. [*191]

RENTS AND PROFITS AND VARIOUS OTHER MATTERS OF ACCOUNT.

WITH respect to *rents and profits*, the adjustive jurisdiction of the court is also sometimes called into operation. Thus where there are long accounts between landlord and tenant as to expenditures made under

(*l*) Sto. P. 517. (*m*) Ibid. 518. (*n*) Sto. 462.
(*o*) Ibid. 468. (*p*) Ibid. 462.

any special terms or stipulations in the lease, this court will frequently assist; and so judgment creditors who take possession under an elegit, will, if necessary, be made to account for their receipts and expenditures.(*a*) The remedy, however, for rents and profits, including that of *mesne profits*, is generally at law, and when full and speedy relief can be had there, this court will decline to interfere; nevertheless its assistance will readily be given in all proper cases in which some good equitable ground for interference can be shown, such as fraud, accident, mistake, the want of discovery, some impediment at law, the existence of a constructive trust, or the necessity of intervention for preventing a multiplicity of suits. Thus a *cestui que trust*, who comes into equity for the recovery of his estate from a trustee, is allowed the further relief of an account of rents and profits. So creditors are entitled to an account of the profits of the property of which they are obliged to come to equity for a distribution. And where a person enters on an infant's lands and take the profits, he is treated as a trustee, and made to account accordingly; and if the tenant in possession stays the execution of a writ of possession by injunction, and then dies, as there is no remedy at law (from the action of tort generally dying with the person,) equity will relieve.(*b*) It seems now decided, *that at law nothing can be recovered by a joint [*192] owner from his co-owner in respect of a sole occupation of the joint property by the latter; and it is also doubtful whether any relief can in such a case be given in equity.(*c*) An action of account, however, lies, under the 4th stat. of Ann, c. 16, s. 27, against a co-tenant who has been *in receipt* of the rents of the joint property, and in equity such tenant would have to account accordingly.

With regard to *Tithes* and *Moduses*, proceedings are frequently taken in equity, and whenever the right is clearly established, an account is consequential. If the right is disputed, it must be first ascertained at law, and in some cases the court will direct an issue for the determination of such right, and in the meantime retain the bill.(*d*) The commutations which have been made under the acts for such purpose have already, in most places, destroyed the tithes and created *rent-charges* in lieu, and in time, commutations will be extended over the whole kingdom, and tithes be altogether extinguished.

Where *dower* has not been fully assigned, equity, in nearly every case, assists and compels an account; for though there are means of proceeding at law, nearly every case requires some equitable relief, as a discovery of the title deeds, or of the lands which are subject to dower or other discovery or assistance peculiar to equity.(*e*)

In most cases of *damages* and *compensation*, as relief can generally be had at law the parties most usually pursue their legal remedies. To a plaintiff equity will seldom decree either damages or compensation, except as incident to other relief sought by him and actually granted, or where there is no adequate remedy at law, or there is some peculiar intervening equity; but to a defendant compensation is frequently given,

(*a*) Sto. 508-510. (*b*) Ibid. 511-513.
(*c*) Henderson v. Eason, 21 L. J. (Q. B.); 2 Phil. 134.
(*d*) Sto. 519. (*e*) Ibid. 512-626.

on the ground that he who seeks equity must do equity; and, therefore, if a person seeks the aid of the court to enforce his title to property against an innocent party who has improved *it, believing himself the owner, such aid will be only rendered on condition of [*193] his compensating the party proportionably to the improvements made. It seems undecided whether a *bonâ fide* possessor who has been ejected at law can recover any compensation for improvements made on the estate where the real owner has not been guilty of fraud or laches.(*g*)

Damages in respect of *waste* are most properly obtainable at law, without such waste was equitable only, in which case of course equity is the proper forum. Where, however, it is necessary to come to equity for the purpose of restraining further waste, full relief will generally be awarded by decreeing an account in respect of the waste committed, and according to some cases, the necessity of a discovery alone will enable the court to compel an account, and thus afford full justice without the necessity of also proceeding at law.(*h*)

As a general rule, neither at law or in equity can compensation for loss of a bargain respecting land be obtained, if the contract fails on account of want of title in the vendor, without he was guilty of *mala fides*. It seems, however, that if the abstract, after being examined with the title deeds, show a good title, and the purchaser then sells his right to a third party, the costs of such second purchaser, which the first has paid, may at law be recovered from the vendor.(*i*)

The amount of damages or compensation is sometimes assessed by means of a reference to the master, while in cases of complication the mode is more frequently by directing an issue to be tried by a jury.(*k*)

Formerly there was no relief except in equity respecting *penalties and forfeitures* for breaches of conditions and covenants; and though by various statutes relief can now be had in many cases at law, yet the original jurisdiction of equity still continues, and whenever the penalty or forfeiture appears to have been intended merely to secure the enjoyment of a right, or the performance of some act, equity considers the *enjoyment or performance as the real object of the stipulation, [*194] and, therefore, provided a compensation can be made for the breach, will relieve against the penalty or forfeiture, by decreeing a compensation proportionate to the damage really incurred; and in cases of penalties and forfeitures for non-payment of money, relief is generally given, but in other cases the relief is not so extensive, and is only awarded where the thing, the omission whereof has occasioned the forfeiture, can be specifically done so as to put the party *bonâ fide* and entirely *in statu quo*, or the injury can be compensated by a sum certain, or by damages which can be estimated by some certain rule of the court. However, where there has been any fraud, accident, or mistake, the relief will be more readily granted;(*l*) thus, if the interest of a mortgage debt, being reserved at four per cent., is increased to £5 on unpunctual payment, equity will consider such higher rate of interest as a penalty

(*g*) Sto. 709 a, n.
(*h*) Ibid. 515 n., 517.
(*i*) Ibid. 796-799; S. V. & P. 424.
(*k*) Sto. 795.
(*l*) Ibid. 1301-1320; D. Inj. 88.

only and relieve; and therefore the proper mode is to reserve the interest at the higher rate and make it reducible on punctual payment, in which case there could be no relief against the higher rate of interest.(*m*) So in case of a breach of covenant to pay rent, relief is given even though the term has ceased at law by reason of the lessor's entry under a clause of re-entry, for such penal clause is simply deemed a security for the rent; relief, however, is not so easily obtained in cases of forfeiture as of penalties,(*n*) and no relief is granted to a tenant in case of forfeiture for the breach of other covenants than those for payment of rent, unless there are very special circumstances, or there has been some mistake, accident, or fraud; for even where damages can be ascertained by a jury, they rarely work a real compensation;(*o*) therefore, if there is a covenant to insure in the name of the lessor and lessee, and an insurance is made in the lessee's name alone, equity will not it seems [*195] relieve;(*p*) and at law, a covenant to *insure in the name of the lessor is not performed by insuring in his and the lessee's names,(*d*) and equity will not relieve against any penalty or forfeiture imposed by statute, for that would be in contravention of the direct expression of the legislature; nor will it against liquidated damages, which arise where the parties have arranged that if one party shall do or omit a certain act, the other shall receive a stated sum as a just and ascertained recompense, such sum, however, must not be grossly disproportionate to the nature or extent of the injury, or it will be deemed a penalty and relieved against accordingly.(*r*)

Where the penalty is to secure the mere payment of money, the relief is given on payment of what is due with interest; and in other cases where relief is granted, it is on payment of such compensation as the master, or the jury under an issue, according to the direction of the court, shall assess.(*s*)

It must be added, that equity never enforces either a penalty or a forfeiture, but leaves such enforcement to the courts of ordinary judicature; thus equity will never aid in the divesting of an estate for a breach of a covenant or a condition, though it will often, to provent the divesting of an estate.(*t*)

[*196] *CHAPTER IX.

PARTITION AND BOUNDARIES.

THE adjustive powers of equity are often exerted in compelling *partition;* for the inconveniences arising from property being held in undivided shares are such, that persons on whom property has so devolved are usually at once anxious to make a partition of it. If all are desirous

(*m*) 5 J. & B. 396. (*n*) Sto. 1320. (*o*) Ibid. 1315-1323.
(*p*) Green v. Bridges, 4 Sim. 96. (*q*) 17 L. J. (Q. B.) 94.
(*r*) Sto. 1318-1326; 3 J. & B. 325. (*s*) Sto. 1314. (*t*) Ibid. 1319.

and competent to bind their interests, no judicial proceeding is requisite, and they have only to agree on the respective allotments and execute mutual conveyances; but if any are unwilling to concur, or are by reason of minority or mental imbecility incapable, or for any other cause cannot come to an amicable arrangement, proceedings will be necessary for effecting a partition,(*a*) and equity is now the proper forum for such proceedings. At the common law, coparceners and tenants in gavelkind could obtain partition, for as the law threw such undivided estates upon them, it gave a means of division; but tenants in common and joint tenants, their estates being created by the act of parties, and not by the act of the law, could not until the remedy was extended to them by the statutes of 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32. The legal remedy was obtained by means of a writ of partition, but this writ having been abolished by the 3 & 4 Will. IV. c. 27, s. 36, equity has since 1834 exercised exclusive jurisdiction; without, however, the title of the plaintiff is clear, or it has been previously established at law, the court will not order a partition, but will either dismiss the bill or retain it till the title has been established; and as the decree of the court is carried out by mutual conveyances, the party holding the legal title must be before the court.(*b*)

*A partition will not be refused on the ground of difficulties or circumstances arising out of the complex state of the title, or [*197] the minuteness of the shares or interests of the parties; but the court will, whenever necessary, refer it to the master to ascertain what are the several shares and interests. After their ascertainment, either with or without a reference, as each case requires, the court issues a commission for a partition to certain specified persons, who proceed to divide the estate without a jury and make their return to the court, which if not objected to is afterwards confirmed, and proper conveyances are directed for carrying out the partition. Where the estate cannot conveniently be equally divided, a pecuniary compensation is frequently decreed to one, in order to make up his share to the proper value, or as it is called for *owelty* of partition; and in lieu of dividing each of several distinct estates, the whole of one is often allotted to one person, and the whole of another to another person, with a compensation to him who has the least valuable;(*c*) so a compensation or larger share will be awarded to a party who has improved the property. Parties will also be assigned portions which will best accommodate them, and the court will be guided by its own views of general and equal justice to all, and will by its decree adjust all the equitable rights of the interested parties, and, if necessary, direct a distinct partition of the respective portions of the property, or award the whole of particular portions to some and other portions to others, and give other special instructions to the commissioners, and also nominate the commissioners, instead of leaving such nomination to the parties interested.(*d*)

The fact of the parties being infants, or otherwise not *sui juris*, does not prevent a partition; and one will be decreed not only on behalf of

(*a*) 6 J. & B. 586, 587.
(*b*) Ibid. 599.
(*c*) Sto. 654-657.
(*d*) Ibid. 655-656 c.

parties absolutely entitled and copyholders, but also of tenants for years and for life. The partition, however, in such latter cases, does not endure beyond such limited estates.(e)

[*198] The assistance of equity is also sometimes sought for *ascertaining *boundaries;* but the mere fact of their being confused is not considered of itself sufficient to justify the court's interference; there must be some special circumstances, or particular equity shown, to induce the court to exercise its jurisdiction.

Where the confusion has been occasioned by *fraud*, on such fraud being proved, the court will, if possible, ascertain the boundaries by means of a commission issued for the purpose; or, if they cannot be so ascertained, will do justice between the parties, by assigning reasonable boundaries, and setting out lands of equal value;(f) and the same will be done where the confusion has arisen by the *misconduct* or negligence of one who ought to have preserved the boundaries, as of a tenant or copyholder; and, on the same ground, if an agent, by fraud or negligence, confounds his property with that of his principal's, equity relieves; and so it will, if an owner of land, subject to a rent or service, confuses the boundaries so as to prevent a distress. In the above cases, however, it must be both averred and proved that the boundaries cannot be ascertained without the court's assistance.(g)

Where also a *multiplicity of suits* will be prevented by the interference of the court, equity will assist; thus a suit may be sustained for the settlement of the boundaries of a common, because all the commoners having the same right, such right being determined as to one is so as to all. Such a suit, however, cannot be sustained for the purpose of ascertaining the boundaries of a parish, for different persons are interested in different portions of such boundaries; nor, it seems, of a manor.(h)

[*199]

*TITLE IV.

PROTECTIVE EQUITY.

CHAPTER I.

WRITS OF INJUNCTION, NE EXEAT, AND SUPPLICAVIT.

ONE of the principal modes by which equity affords protection, is by means of a judicial writ called an *injunction*, whereby a party is required to do or refrain from doing some particular thing. This process differs from a *mandamus* and a *prohibition* in that it is not directed to any court or public officer, so as in any way to prevent their proceeding, but

(e) 6 J. & B. 603.
(f) Sto. 615-619.
(g) Ibid. 609-623; 1 J. & B. 585.
(h) Sto. 617-621; 1 J. & B. 586.

simply to a private individual, inhibiting him, his servants, and agents from proceeding, if necessary for the object required, with any or some particular judicial process respecting the matter in question, or doing any other thing which may be contrary to justice and the rights of the parties interested, for the Court of Equity does not arrogate to itself any appellate jurisdiction over the other courts, or any power of reversing their decisions; but simply assumes a power of preventing individuals from using the process and judgments of other courts as a means of oppression and injustice.(*a*) A disobedience to the writ of injunction is considered a high contempt of the Court of Chancery, and punishable by the imprisonment of the offender until he has cleared his contempt by submission or otherwise, according to the rules and practice of the court.

Injunctions are divisible into *temporary* and *perpetual*, and these may be either total, or partial, qualified, or unqualified, and their nature is generally preventive, though some are of a restorative character. They are granted for almost every purpose *coming within the cognizance of a Court of Equity, and it is impossible to particularize the cases, for equity constantly declines to lay down any rule limiting its powers and discretion as to the cases in which they shall or not be granted. It seems, however, that without there is some special and sufficient reason to the contrary, injunctions will always be granted for the purpose of protecting its officers against any proceedings instituted against them for acts performed under or by virtue of its direction, and also to prevent persons from making any wrongful or unfair use of another court, or otherwise injuring another contrary to equity and good conscience, and this jurisdiction has arisen either from the want of any other remedy, or from the imperfection or inadequacy of such other remedy where it exists.(*b*) [*200]

Frequently injunctions are granted for the purpose of *restraining proceedings* at law, or in other courts, these are denominated either *common* or *special*. The *first* are obtainable upon and for the default of a defendant in not appearing to or answering, within the time allowed by the practice of the court, a bill which has been filed respecting the matter of proceedings which are pending at law, and in such case are issued of course, the defendant being entitled as soon as he has fully and properly answered the plaintiff's bill to apply to the court for their dissolution, which will be granted, unless the plaintiff can show good cause for continuing the injunction.

The granting, however, of the other kind of injunctions, which are called *special*, is not of course, but rests in the sound discretion of the judge, to whom the application in the particular case is made, after a full consideration of the merits of such case, guided nevertheless by a due regard to the various decisions that have been previously made by other judges of the court in the analogous cases.

Injunctions for restraining proceedings in other courts may be granted at *any stage* of such proceedings; for example, to stay trial, or after ver-

(*a*) Sto. 861-895. (*b*) Ibid. 864-891.

dict to stay application for judgment; after judgment, to stay execution; after execution, to stay the *money in the hands of the sheriff; [*201] or the delivery of possession, or on any other occasion.(c) Applications, however, for the purpose of obtaining an injunction to restrain another from taking advantage of a judgment already obtained at law, have of late years been but little countenanced, and, generally, they will not be granted unless the ground of the application is such as would be sufficient to justify the filing, on the discovery of new matter, of a bill for the purpose of reviewing a decree in equity; and this court will not restrain the enforcement of a legal judgment, where the matter alleged as the reason for the relief could have been used as a defence at law, unless the party applying was prevented from using such defence by fraud or accident, or could not have availed himself of it by any reasonable diligence.(d)

It should here be noticed, that if a common injunction is obtained before the declaration has been delivered in the legal proceedings, it restrains such proceedings altogether, while if the declaration has been actually delivered, then it only stays execution, and, therefore, an application in such case becomes necessary for the purpose of extending the injunction to stay trial.(e)

As equity does not assume any jurisdiction in *criminal* matters, it will not inhibit proceedings in any criminal or other matter which is not strictly of a civil nature, such as proceedings on an indictment or criminal information, or on a mandamus or prohibition, unless the persons prosecuting the same are also at the same time proceeding as plaintiffs in equity in regard to the same matter. Nor will the court interpose, even in civil cases, on the ground of a mistake in pleading, or the conduct of the cause, nor on the ground of an erroneous decision, nor in consequence of a failure in obtaining fresh evidence, or merely to let in new corroborative proofs.(f)

As this writ is, as before stated, not directed to the court, but to the individual and his agents, it can, provided the matter in question is of equitable cognizance, be granted to *restrain proceedings in any [*202] court in this country, whether of an inferior or superior jurisdiction, and, also, where all the parties are residing within the jurisdiction, to restrain proceedings in any foreign court, because equity can act on the parties *in personam* without taking upon itself to control the other court. Thus injunctions have been granted against proceedings in the Ecclesiastical and Admiralty Courts, in the Mayor's and Duchy Courts, in the Stannaries of Cornwall and the Petty Bag Office, and also in the Courts of Law and Equity in Ireland and Scotland, Demerara, and other countries.(g)

In cases of *waste* the court frequently interferes by injunction, almost always where the waste is voluntary; but where it is permissive, it seems it declines to interfere, except in special cases.(h) The interposition of equity

(c) Sto. 886. (d) Ibid. 887-895. (e) D. C. P. 1475.
(f) Sto. 897. (g) D. C. P. 1496 et seq.; Sto. 899.
(h) 2 D. Inj. 174. Though equity may not interfere, (24 L. J. 143,) tenants for life and years are liable for permissive waste; 24 L. J. (Ex.) 289.

in these cases has arisen from the difficulty, and, in some instances, the impracticability of obtaining any sufficient redress at law. There was formerly, in certain cases, a legal remedy by means of the action of waste; this, however, was abolished by the 3 & 4 Will. IV. c. 27, and the legal remedy is now by an *action on the case* for waste, which can be maintained by a person having the next immediate estate in expectancy, whether in fee, for life, or years, against a tenant or a stranger, and also even against a tenant in common, or joint tenant who has destroyed the joint property, and it can be either for voluntary or permissive waste; a tenant at will, however, and probably also a tenant from year to year, is not liable for permissive waste.(*i*) By the above action, however, damages for the waste *committed* are only recovered, and a fresh action would become necessary in case of further waste, which it cannot restrain; nor can this action apply to equitable waste, or be maintained for legal waste by all who are really interested in restraining it.

Before the court of equity will grant the injunction, there must be some *threat* made or *act done*, the mere belief of intended waste not being sufficient; and the person applying for *the injunction must come promptly, and if the title is doubtful or disputed, or the party [*203] claiming has been out of possession for a long time, it will not be granted until the title has been established at law, except, perhaps, temporarily, to prevent irreparable injury arising while the right is being established.(*k*) It may be obtained on behalf of a person (even in *ventre sa mere*) having the next immediate estate of inheritance, and also of one having a contingent or executory estate of inheritance;(*l*) and, in some cases, the next tenant for life can obtain an injunction, though not an account also, as the person having the inheritance can. A landlord can obtain an injunction against his lessee, a mortgagee against a mortgagor, if the security is scanty or the latter is bankrupt; a mortgagor against a mortgagee, a patron against a rector, a copyholder against a lord, or the converse; also by one tenant in common, joint tenant, or coparcener against the other, provided the waste occasions a destruction of the estate but not otherwise, for they have an equal right to enjoy the estate as they choose, and if they cannot agree they should obtain a partition; nor can an injunction be obtained against the owner of the inheritance, unless he is a trustee, for both tenants in fee and in tail have a right to commit waste.(*m*)

An injunction will also, in many cases, be granted to restrain what has been designated *equitable waste*, or such destructive acts as are not at law punishable as waste, in consequence of their being consistent with the legal rights of the party committing it, but are deemed in equity as unjustifiable, and to be restrained in consequence of their occasioning an unconscientious and irreparable injury to the interests of those who will succeed to the property, as where a tenant in tail after possibility of issue extinct, or a tenant for life without impeachment of waste, pulls down houses, or fells trees planted for the shelter or ornament of the property.(*n*)

When a tenant for life or other limited interest commits waste, as, for

(*i*) 3 Steph. Bl. 478. (*k*) 18 L. J. 163. (*l*) Mad. 194, 195.
(*m*) Ibid. 201-205. (*n*) Sto. 915.

[*204] example, by felling timber, he will not be allowed any *life or other interest in the value; but the same, with all accumulations during such limited interest, will go to the person absolutely entitled.(o)

Injunctions are also granted to suppress the commission or continuance of a *nuisance*. Nuisances are of two kinds, those which are injurious, firstly, to the *public* at large, and, secondly, to the rights and interests of *private* persons. With respect to the first, the jurisdiction is of very ancient date, and founded on the irreparable damage to individuals, and the great public injury which is likely to ensue, and an information will lie in equity to stop the mischief and restrain the continuance of it. The ordinary course is for the attorney-general to sue on the public's behalf; but individuals who are aggrieved by it can also come and seek the court's assistance.(p)

With regard to *private* nuisances, the court will interefore where the mischief would be irreparable, but not in every case in which an action would lie at law. There must, it seems, be such an injury as from its nature is not susceptible of being adequately compensated for by damages, or such as would, if continued, occasion a constantly recurring grievance, which cannot be prevented except by an injunction. On these grounds injunctions have been granted to restrain the darkening of ancient windows, the diversions of watercourses, the destroying the banks of rivers and other injurious acts.(q)

The interests of an inventor or an author in his *patents* and *copyrights* will also frequently be protected by injunction, on the ground that there is no *complete* remedy at law, or power of restraining future infringements. With respect both to patents and copyrights, when the legal title appears on the record, and has been either directly established by decision or by uninterrupted usage and possession, the injunction will generally be granted at once; but in other cases, if the title is denied, equity will generally require it to be first established at law, retaining the bill in the interval, and obliging the defendant to keep an account [*205] of his dealings and profits respecting *the matter in question; even after the expiration of a patent, the sale of articles manufactured during the continuance, and in violation, of the patent will be restrained.(r) A patent, to be good, must be of something *new* and *useful*, and must be fully and fairly described in the specification, and not claim too much; it may be either of a new thing altogether, or only of an addition, and the fact that it is an addition to an existing patent is immaterial.(s)

With respect to *copyright*, where the work is of a clearly irreligious, immoral, libellous, or obscene character, or has been published as a translation of some eminent writer when it is not, equity will afford no relief. Frequently there is considerable difficulty in saying whether there is a piracy or not, for it is allowable to make a *bonâ fide* extract, quotation or abridgment, or a *bonâ fide* use of common materials in the composition of another book, and, in fact, the majority of books are compiled by

(o) 21 L. J. (Eq.) 49.
(p) D. C. P. 1507; Sto. 923.
(q) D. C. P. 1507; Sto. 925.
(r) D. C. P. 1510; Sto. 930-934.
(s) 7 J. & B. 481; and as to obtaining patents, see 5 & 6 Will. 4, c. 83.

gleaning from other works on the same subjects, and abridgments, when fairly and properly made, really constitute new works. An unfair or fraudulent use however of another's labours must not be made, and the court will either take upon itself, or refer to the master, the examination of the original work and the one alleged to be pirated. Where the piracy is very small, no injunction will be granted; but if it extends to any considerable portion of the work, an injunction will be granted against the particular portions of the work which are thus objectionable, or if they cannot be separated, against the whole work.(*t*) It seems now determined that a *foreign* author, or his assigns, can have a copyright in this country, provided the work has been first published here, and such foreigner's country is at peace with ours.(*u*) By the international copyright act,(*x*) the queen by order in council may direct that authors of works first published abroad shall have a copyright therein within any of her dominions for such period as she considers proper, *not exceeding the usual time of copyright in this kingdom. And a [*206] convention lately been concluded between this country and France respecting the works of the respective nations, which has been partially carried into effect by an order under the above act, and will also probably be further authorized by an act now before the legislature.

The 5 & 6 Vict. c. 45, is now the principal copyright act, and by its third section the copyright as to books and writings published since the 1st July, 1842, if so published in the author's lifetime, is for *his life and seven years*, or forty-two years, whichever is the longest; and if published after the author's death, then for forty-two years; the fourth section applies to publications before the 1st July, 1842. A copy of a work when published is to be delivered within twelve calender months to the British Museum, ante, p. 270, and four copies within one lunar month after a demand made (which may be within twelve lunar months) to the Stationers' Hall for the following libraries, namely, the Bodleian library at Oxford, the public library at Cambridge, the Edinburgh library, and the Dublin (s. 6 to 10,) Proprietors of *Cyclopædias* are given a copyright of twenty-eight years in articles published therein, and the remaining period of regular copyright is given the authors (s. 18).

Provisions are made as to *lectures* by 5 & 6 Will. IV. c. 65; as to *dramatic* and *musical pieces* by 3 & 4 Will. IV. c. 15, and 5 & 6 Vict. c. 45, s. 21; as to *prints* and *engravings* by 8 Geo. II. c. 13; 7 Geo. III. c. 38; 17 Geo. III. c. 57, and 6 & 7 Will. IV. c. 59, giving a twenty-eight years' copyright; as to *designs* by 5 & 6 Vict. c. 100, giving a right, according to the kind, of three years, twelve calender months, and nine calender months;(*y*) and as to *sculptures* and *casts*, by 38 Geo. III. c. 71, and 54 Geo. III. c. 56, giving a right for *fourteen years*, and if alive at the end of such period, a further period of fourteen years. The late statutes of 8 & 9 Vict. c. 93, and 10 & 11 Vict. c. 95, as to the importation of works and their protection in the colonies, and of 14 &

(*t*) D. C. P. 1511-1514; Sto. 935, 936.
(*u*) Boosey v. Jeffries, 20 L. J. (Ex.) 354. Foreigners resident abroad have at common law no copyright, 24 L. J. (Ex.) 81.
(*x*) 7 Vict. c. 12. (*y*) See also 6 & 7 Vict. c. 65; 13 & 14 Vict. c. 104

[*207] 15 Vict. c. 8, as to inventions *placed in the Exhibition of the Works of Industry of all Nations, may also here be noticed.

The infringement of *trade marks*, if the legal title is clear or has been determined, will be stayed by injunction, and one will be granted against the use of that which has been obtained surreptitiously, or in breach of confidence or good faith; thus a late partner was restrained from compounding and selling a medicine (though unpatented,) and using the secrets of a firm, the knowledge whereof such partner had obtained surreptitiously and in breach of confidence and good faith.(*z*)

The publication of *manuscript* treatises or private *letters*, whether, it seems, of a literary character or not, if attempted to be published without the author's consent, will also be restrained by injunction. The writer of a letter has a joint property in it with the person to whom it is addressed, and the receiver has only a qualified property; it is a gift to him for the purpose of reading, and sometimes also for keeping, but *ultra* the purposes for which it is sent, the property of the letter remains in the sender, and it cannot be published without his consent.(*a*)

Injunctions are also sometimes granted to prevent the *setting up* of a *title*, which may prevent the fair trial of a right at law, as that of a term of years or other interest in a trustee, mortgagee, or lessee,(*b*) also to prevent a presentation or institution to a living, to protect a chattel till the right to its ownership is tried, to stay the dissolution of certain partnerships, to restrain a partner from accepting and signing notes and bills in the name of the partnership, to restrain a partner from disposing of the joint-stock after the decease of his co-partner, to prevent an attorney from leaving his client and acting for the opposite party, to restrain parties from improperly dealing with property in their hands, and in many other cases.(*c*) Equity also frequently carries out its own orders and decrees by enjoining parties to quit, deliver up, or continue the pos-

[*208] session *of property, and by following up such injunction by a writ of assistance.(*d*)

For the purpose of preventing persons from leaving the kingdom, another writ, called a writ of *ne exeat regno*, is issued by the court. It is an high prerogative writ, and was originally applicable only to state purposes, but was afterwards extended to private transactions, and is now chiefly used therein; it is, however, applied with great caution, and generally only after a bill has been filed.(*e*)

As it is considered as the equitable mode of compelling a defendant who is about leaving the country to give bail, it will not as a general rule be granted, except in cases of *equitable claims* and debts, for where the debt is legal the proper mode of proceeding is at common law, where generally a *capias* can be obtained for a similar purpose. To this rule, however, there are two exceptions; first, where *alimony* has been decreed by the Spiritual Court and no appeal entered, as such court cannot take proper bail or security, this court will lend assistance to the woman, if the husband is about to quit the country; and second, where, in some

(*z*) 20 L. J. (Eq.) 513.
(*a*) D. C. P. 1515, 1516; Sto. 944-948.
(*b*) Mad. 220.
(*c*) Ibid. 222 et seq.
(*d*) Sto. 958.
(*e*) Ibid. 1465-1467; D. C. P. 1562-1571.

equitable proceeding, there is an *admitted balance* due from the defendant to the plaintiff, and the latter claims a larger sum, the court will issue the writ. This last, however, is perhaps hardly an exception, for by the proceedings being carried on in equity, the claim must necessarily be one over which the court has cognizance, although not exclusively, but only concurrently with law.(*f*)

This writ will not be issued without the demand is certain in its nature, and pecuniary, and actually due and payable, and not contingent or future, and the plaintiff must be in a situation to swear positively that a certain sum is due, except in the case of a suit for an account, in which it will be sufficient for the plaintiff to swear that, according to the best of his belief, a balance of some particular sum (stating it,) at the *least, would be found justly due to him, if the account was taken.(*g*) [*209]

Formerly, the court was in the habit of issuing a writ for the purpose of restraining a breach of the peace, called a *writ of supplicavit*, which required the party against whom it issued to find sureties to keep the peace, as, for example, a husband to keep the peace towards his wife. This writ, however, is now seldom granted, in consequence of there being an adequate remedy at common law.(*h*)

*CHAPTER II. [*210]

BILLS OF PEACE AND TO ESTABLISH WILLS.

It is a general principle of public policy, which in some form or other may be found in the jurisprudence of every civilized nation, that an end ought to be put to litigation, and above all to that which would be fruitless, *interest reipublicæ ut sit finis litium;* and the court of equity, acting on such principle, will allow suits to be instituted for the procuring of repose from perpetual litigation. These suits are commenced by bills, which, on account of the object they thus seek, are justly called *bills of peace.* They are divisible into *two* classes; first, those which are brought for the purpose of *confirming some right* which has previously been satisfactorily *established* by more than one legal trial, but is likely to be again litigated; and *secondly*, those which are instituted for the *establishment* and perpetuation, *against* or *in favour of a number* of persons (more than two,) of some *private right*, which, from its general nature, may probably be attempted to be overthrown or established by various persons, at various times, and by different proceedings. The prevention of perpetual and oppressive litigation is the object of the first class of cases, and the prevention of a multiplicity of suits, of the other. To the first may be referred the relief which equity will award by perpetual injunction against further proceedings where two or more trials, as in

(*f*) D. C. P. 1562 et seq.; Sto. 1470 et seq.
(*g*) D. C. P. 1567, 1568; Sto. 1474. (*h*) Sto. 1476.

ejectment, have been had respecting the same right, and decided in favour of the same person.(a) To the second may be referred the assistance which this court will afford for the settlement of the *quantum* of a fine payable by all the copyholders of a manor; for the establishment of [*211] a *right of common for a particular class of persons, as the freeholders of a manor; a bill to establish boundaries is also of this nature, when many are interested in the decision; so are bills by a parson against his parishioners for tithes; by parishioners against a parson to establish a modus; by a party in interest to establish a toll due by custom; and by a like party to establish the right to profits of a fair, there being several claimants.(b)

Generally the plaintiff should establish his right at law before applying to equity, for these bills are not designed for the decision of doubtful rights, but for securing the peaceable enjoyment of a right which, *primâ facie* at least, clearly exists. Where, however, the plaintiff, by not having been actually disturbed, has been unable to try his right, he may institute a suit for its establishment, and the court will, if requisite, direct a trial at law for its ascertainment, and afterwards make a decree finally binding the parties.(c)

Bills of this kind cannot, however, be brought for the establishment or enjoyment of the right of a person who claims *against* a *public* right, as for example an exclusive right to a highway, or rope-ferry, or a common navigable river; for equity, on principles of public policy, refuses to intercept the assertion of public rights.(d)

Although, as has been previously mentioned,(e) the proper forum for determining the validity of a will, which is disputed, is, as to personalty, in the spiritual court, and as to realty in the common law courts, the court of equity frequently usefully exercises its power in the *establishment of wills* both of realty and personalty; thus when a will is contested, and the establishment of its validity is necessary for the accomplishment of what it is the province of equity to carry out (such as the execution of its trusts and the administration of assets,) equity will, where the will relates to personal property and has been proved, but the parties are dissatisfied with such proof, postpone the decision of the cause until [*212] the will's validity *can be fully and satisfactorily proved in the spiritual court, and then decide accordingly; or if the will is of realty and disputed, direct an ejectment or issue at law for the determination of its validity, and then act accordingly; and will, provided the will is established satisfactorily in either case, decree a perpetual injunction against the further litigation of the question. It will not, however, consider itself bound by a single trial, unless such is entirely satisfactory, but will order other trials until satisfied.(f) So, after the validity of a will has been decided by two or more proper trials, equity will enjoin further controversy; and by consent, the heir can come into equity for the purpose of obtaining an issue to try the validity of the will. And when there are impediments to the proper trial of an ejectment or other

(a) Sto. 859. (b) Ibid. 855, 856. (c) Ibid. 854; Mit. 146.
(d) Sto. 858. (e) Page 39. (f) Sto. 1445 et seq.

proceedings in which the validity of a will ought to be tested, equity will frequently remove such impediments.(*g*)

*CHAPTER III. [*213]

INTERPLEADER.

WHERE a person is in possession of property and ready and willing to deliver it over to the true owner, but is unable to discover who that is, in consequence of two or more adverse parties laying claim thereto, it is right that there should be some means whereby the party in possession, making no claim himself, should be able to free himself from responsibility. At common law there was a process of interpleader for such purpose where an action of detinue was brought, but not in other cases; so that prior to the Interpleader Act of Will. IV.(*a*) the remedy at law was most inadequate; and although by that act relief at law can commonly be had, yet it cannot in all cases. And further, as the grant of new power to the courts of law does not abrogate the equitable power, the jurisdiction of equity still extends to most cases in which interpleader is necessary, and remains substantially on its old foundation; although, of course, if the required relief can be properly and fully had at law under the act, it would be useless to apply to equity. It will therefore be well to state shortly the provisions of the act.

Under it a defendant who is sued at law in *assumpsit, debt, detinue or trover*, may, after declaration and before plea, apply to the court in which the action is pending, by affidavit or otherwise, showing that he claims no interest in the subject-matter of the action, but that it is claimed or supposed to belong to another, who has sued, or is expected to sue for it; that the defendant does not collude, and is ready to pay or dispose of the thing claimed as the court directs; and the court may *order [*214] such other person to state his claim, and can direct issues to try the right. On an application also of a *sheriff* or other officer levying execution against goods which are claimed by other persons, the court can order the execution creditor and the claimant to interplead. Provisions likewise are made as to adverse claims on prohibitions and mandamus. The act, however, it seems, does not extend to actions of covenant, replevin, trespass or ejectment, nor to actions for unliquidated damages;(*b*) and where the claim is merely equitable, it is doubtful whether the court of law will interfere or leave the parties to equity.(*c*)

In equity, it seems an order to interplead will be granted on a bill or claim being filed for that purpose by one, from whom two or more, whose titles are connected either by being derived from a common source or from the one being derived from the other, and whose real rights he is unable to discover or determine, have claimed (and a mere claim is suffi-

(*g*) Sto. 1447.
(*b*) 6 Dow. 517.
(*a*) 1 & 2 Will. 4, c. 58.
(*c*) 8 M. & W. 155.

cient) some and the same property or right, to which he makes no claim.(*d*) Thus a tenant, owing rent which is claimed by several claiming title in privity of contract or tenure, can file such a bill against the parties so claiming, but he cannot against a mere stranger who claims by title paramount, and not in privity of contract or tenure, for their claims are not the same, the stranger's right (if any) being not to rent, but to damages for use and occupation, and the landlord being entitled to rent, as such, in privity of contract, tenure and title;(*e*) and therefore in such case, and also wherever the titles of the claimants are not derived from one another, nor from the same common source, but are independent and adverse to each other, the party against whom the claim is made must protect himself as well as he can at law, for the Court of Chancery will not take upon itself to try mere legal titles on a contest between different parties, where there is no privity of contract or title between them and the party praying for an interpleader.(*f*)

[*215] *A *private agent* of one of the claimants cannot obtain an interpleader in equity, for his possession is that of the principal, and the agent must deal with it according to the orders of the principal; and the same rule holds in favour of one, to whom the principal, after the delivery to the agent, has transferred the right, provided such transfer has been assented to by the agent. It seems, however, doubtful whether there is not some difference, when the agent is a *public* one, as the keeper of a public bounded warehouse, for in such case it may be said he is not the agent of any particular individual, but simply of the party who for the time being is the real owner.(*g*)

Where, however, the principal creates a lien in favour of another on a fund or property in an agent's possession, and the nature and extent thereof is disputed between the principal and such other party, an interpleader may be had, for a question then arises as to who is the real principal, the assignee having in fact the rights of the assignor and a privity of title with him.(*h*)

The party desiring an interpleader should be able to admit the title of each claimant; therefore, a sheriff, who seizes property under an execution, cannot obtain an interpleader in equity in case of adverse claims, for as to one of the claimants, he must necessarily admit himself a wrong-doer, he, therefore, can only proceed under the before-mentioned act of Will. IV.(*i*) An auctioneer also will not be allowed to interplead, without he is willing to give up the whole deposit money, without any deduction for his commission or costs.(*k*)

The prayer of an interpleader suit is, that the claimants may contest their claims, and that the court may decide the right, and that the plaintiff may be indemnified; and in order to prevent such proceedings being made the instrument of delay, or of collusion with one of the parties, the plaintiff is required to make an affidavit that there is no collusion between him and the defendant. The plaintiff, however, is not required to swear that the proceedings are taken at his expense, or with-

(*d*) Sto. 806; 2 Ves. jun. 107.
(*e*) Sto. 811, 812.
(*f*) Ibid. 812-820.
(*g*) Ibid. 817, 818.
(*h*) Ibid. 817.
(*i*) See p. 213.
(*k*) Sto. 821.

out *the knowledge of either of the defendants; and the plaintiff should, when there is any money in his hands or due from him, offer to bring the amount into court.(l) [*216]

There are also bills in the nature of interpleader. Thus, if a person is entitled to equitable relief against the owner, whoever he is, of certain property, but the legal title being disputed between two or more, he cannot ascertain who is such owner, he can apply to equity for relief. A purchaser also may do so against the vendor or his assignee, or any creditor who seeks to avoid the assignee's title, and pray the court to direct to whom he shall pay the purchase money.(m)

*CHAPTER IV. [*217]

THE CANCELLATION AND DELIVERY UP OF INSTRUMENTS.

UPON the principle, as it is generally called, *quia timet*, or for fear that future injury or injustice might arise, this court frequently cancels, or orders the delivery up of, instruments which have answered the objects of their creation, or are voidable, or even void if not apparently so;(a) for, otherwise, they may be vexatiously or injuriously used after the evidence to impeach them may be lost or lessened, or may throw a suspicion over the applicant's title and interest. The granting of such relief, however, is *not* by way *of* absolute *right*, but is a matter of sound discretion, to be exercised by the court as it thinks proper, according to the circumstances of each case; and consequently, this relief is frequently granted only on terms.(b) In cases where the instrument is simply imperfect by reason of some accident or mistake, and also where there has been merely a fraudulent insertion or omission of some particular matter which is separable from the other portions of the document, an amendment or alteration, and not a cancellation or delivery up, is the appropriate and equitable relief: but where the accident or mistake (as in some few instances) or the fraud (as in most) affects the whole instrument, the latter species of relief is the more appropriate.(c) *Illegality* also is frequently a ground for this relief, but when such illegality is apparent on the face of the instrument, equity, on the ground that its interference would be useless from the nullity clearly appearing, declines to assist.(d)

The above relief will generally be granted where there has *been any *fraud* (either actual or constructive,) and the applicant has not participated therein, and is not *in pari delicto;* and also, where the fraud is against public policy, and such policy would be more promoted by assisting than otherwise, even when the applicant has participated therein and is *in pari delicto;*(e) except, however, where public policy [*218]

(l) Sto. 809; 1 Mad. 175.
(m) Sto. 824.
(a) Ibid. 694, 700.
(b) Ibid. 693-700.
(c) Ibid. 298.
(d) Ibid. 700.
(e) Ibid. 695.

would be promoted, relief is not granted where both are in like fault, for in such case *potior est conditio defendentis et possidentis.*(*f*)

The fact that both were concerned in the illegal act does not necessarily show that they are *in pari delicto*, for one may have acted under circumstances of oppression, imposition, undue influence, or great inequality of age or position, and thus have been far less guilty than the other.(*g*) Thus, in cases of *usury*, the lender, as he committed the improper act voluntarily, can obtain no relief if he applies to equity, but the borrower can, on submitting to such terms as the court thinks fit to require, for although he was a participator in the illegality, he was, from his necessities, compelled to submit to the terms of the lender, and as Lord Ellenborough observed, it never can be predicated as *parum delictum* when one holds the rod and the other bows to it.(*h*) The terms on which relief is generally granted to the borrower is, that he do equity by paying what is really due, deducting the usurious interest; and in cases of annuity securities, and other cases where there is an equitable right to compensation, the relief is frequently on similar terms.(*i*) Even where the usurious interest has been paid, it seems both equity and law will assist in obliging the repayment of the excess over lawful interest, for such interest cannot be said to have been voluntarily paid.(*k*)

Forged instruments can also be decreed to be delivered up even though there has been no prior decision at law respecting the forgery;(*l*) and [*219] bonds and notes given by a relation have *been ordered to be delivered up by the executors, where it was fairly inferable from the deceased's conduct that he intended no use should be made of them.(*m*) With respect also to instruments which are in no way tainted with any fraud or illegality, nor otherwise exceptionable, assistance will sometimes even be given both in cases of a public and private nature; thus the court will order documents to be delivered up to the person entitled, provided his title to the land or other property to which they refer is not disputed; where, however, it is, and he is not in the possession of such property, and the evidence of his title is in his own power, or does not depend on their production, he must first establish his title at law.(*n*) Persons, also, who have rights and interests in property, although they may not be entitled to the custody, can frequently come to this court for an inspection and copies of the documents under which they claim, and reversioners and others having limited or ulterior estates in property, provided their interests are not too contingent or remote, have a right, on clearly showing that the documents of title are likely to be lost or injured by remaining in the custody of the present possessors, to have such documents brought into court for preservation.(*o*)

Where the party holding the documents has an equity against the plaintiff, the court will not decree the delivery up except on terms; thus the heir cannot obtain them from a jointress without confirming her jointure, and if a second mortgagee, without notice, has the title deeds, the first mortgagee cannot obtain them without paying the second;

(*f*) Sto. 298. (*g*) Ibid. 300. (*h*) B. L. N. 569; Sto. 302.
(*i*) Sto. 301. (*k*) Ibid. 302. (*l*) Ibid. 701.
(*m*) Ibid. 705 a. (*n*) Ibid. 703. (*o*) Ibid. 704.

where, however, the first mortgagee has the legal title, he can generally recover them at law.(*p*)

*CHAPTER V. [*220]

PAYMENT OF MONEY INTO COURT, AND RECEIVERS.

EQUITY in many cases affords protection by ordering a sum of money to be paid into court, and in others by directing it to be paid over to the party entitled, or properly to be secured.

The order to pay into court is generally made pending the proceedings in a suit, in order that it may be secured until the decree, and then properly paid to, or divided amongst, those really entitled.

It is most frequently made in respect of moneys which are in the possession of parties as *trustees*, executors, or administrators; and by a recent act,(*a*) great facilities are given to trustees and others in those situations, enabling them to free themselves of liability by paying moneys in their hands into the Court of Chancery, and allowing questions respecting the rights of the parties interested to be decided on summary applications.(*b*)

The *purchase-moneys* of the property sold under the decree of the court, are also generally paid into court, but orders for such purpose will not usually be made until the title has been accepted. In special cases, however, with the consent of the parties, the court can and will sometimes so direct, although the title has not been accepted.(*c*) And in cases of sales not under a decree, similar orders are in some cases made against purchasers who are *in possession* of the purchased property.(*d*)

In cases of *partnership* suits also, orders for a like purpose are often made, as well as in numerous other cases; especially in those in which the court can exercise a discretion as to *giving or withholding [*221] the required relief, for there the judge will often decline to interfere without the applicant will first bring the amount in dispute, or some specified sum, into court to abide the event; and under the railway and other company's acts, moneys are also frequently paid into court.(*e*)

If the payment into court is made in an interlocutory application, it does not alter the rights of the persons interested therein, and therefore an executor's right of retainer would not be prejudiced by such a payment.(*f*)

Besides the protection which the Court of Chancery so frequently affords in the different modes previously pointed out, it further exercises

(*p*) 2 Jones & Lat. 374; 12 Jur. 443; 5 J. & B. 480; 6 Taunt. 12.
(*a*) 10 & 11 Vict. c. 96.
(*b*) See also 12 & 13 Vict. c. 74; Ord. 10th June, 1848.
(*c*) 17 L. J. (Eq.) 8; 18 L. J. (Eq.) 157.
(*d*) D. C. P. 1640.
(*e*) Ibid. 1642, 1734.
(*f*) Ibid. 1644.

its protective powers for the prevention of anticipated wrong or loss, by appointing an indifferent person, called a *receiver*, to receive the rents and other income or profits of property, and also in some cases, such as that of administration and dissolved partnerships, to get in and collect the outstanding assets. This is done when it is sufficiently shown to the court that it would be unsafe or impolitic to allow either party to receive or collect the same, or the proper party is incompetent, as in the case of an infant.(*g*)

Whenever it is requisite, the receiver will also be appointed a *manager*, for the purpose of carrying on or superintending a trade or business, especially in the cases of mines and collieries, or plantations in the Indies and colonies.(*h*)

The person so appointed is treated as an officer and representative of the court, and his appointment in no way affects the right, where there are adverse claims, for his possession of the property is treated firstly as that of the court, and then of the party who ultimately establishes his right to it; and the tenants must pay him all arrears of rent due at the time of his appointment as well as those accruing, and after the tenants have attorned, which they are generally obliged to do, he can distrain, and, with the approbation of the master, can let and manage the estate; and though he can give a tenant from year to year notice to quit, he can-
[*222] not bring ejectment against *a tenant, or institute proceedings for the recovery of outstanding debts, without the master's sanction, nor without such sanction will he be allowed more than a very small sum for expenditure on the estate. It is to be noticed, however, that managers or receivers for the Indies or the colonies have larger powers for letting and managing than receivers in this country.(*i*)

[*223] *TITLE V.

PROTECTIVE EQUITY IN FAVOUR OF PERSONS UNDER DISABILITY.

CHAPTER I.

MARRIED WOMEN.

To *married woman* as well as *infants*, greater protection is afforded by the Court of Chancery than to others, in consequence of the disability they are considered as labouring under from their situation, and it now seems desirable that we should make some concise observations on the

(*g*) D. C. P. 1582; Sto. 826.
(*h*) D. C. P. 1631.
(*i*) D. C. P. 1617, 1633; Sto. 833.

general rights and liabilities of such persons; and *firstly*, of *married women*.

Marriage at the common law is, for nearly all purposes, considered as merging the wife in the person of the husband, and uniting them into one, so that, except under the Statute of Uses, a gift or conveyance of property cannot be made from one to the other (except, perhaps, as paraphernalia;)(*a*) nor can they enter into agreements or covenants with one another, or sue each other; nor, except in case of personal violence between them, and under the bankrupt laws, give evidence against each other, not even, it seems, under the recent act on evidence.(*aa*) This inability of witnessing against one another seems, however, founded more on the ground of domestic confidence and public policy than on the unity of person.(*b*)

In equity, however, this identity of the persons is not so much attended to, and the husband and wife are frequently treated as separate and distinct indviduals, and allowed to have adverse interests and rights, and when necessary, to proceed *against each other for their enforcement. In illustrating this we will consider, [*224]

I. Their powers in equity of contracting with and granting to each other.
II. Their respective rights to property.
III. The wife's equity to a settlement.
IV. Separate estate.
V. Pin-money.
VI. Paraphernalia.
VII. Separation of husband and wife.

I. *The Husband and Wife's Powers of contracting with and granting to each other.*

In consequence of the fiction of law, which deems marriage as occasioning a unity of person between husband and wife, and merging the latter in the former, any *pre-nuptial* agreement or contract, which may have been made between them is considered extinguished by the marriage, unless it is respecting something which may occur after the determination of the coverture; but equity, although it generally in such matters follows the law, will nevertheless uphold and carry into effect such contract, provided their enforcement would be in furtherance of the manifest intention of the contracting parties, as in the case of a pre-nuptial agreement, even without the intervention of trustees, for a settlement on themselves or children.(*c*)

Post-nuptial contracts, also, between married persons, although void at law, will, under special circumstances (particularly if there was a valuable consideration,) be enforced in equity, provided they are of a reasonable nature, so that a wife is even sometimes allowed to be a creditor of the husband, and enforce her rights against him, and those claiming under him as his personal representatives or otherwise;(*d*) for

(*a*) See p. 240. (*aa*) Altered by 16 & 17 Vict. c. 83.
(*b*) Steph. Bl. 297; 18 L. T. 127, 149. (*c*) Sto. 1370, 1371.
(*d*) Ibid. 1372, 1373.

though at law no proceedings can be instituted by the one against the other, in equity the wife is permitted when necessary, to proceed *against the husband for the enforcement of her rights, by a *prochein ami* or next friend, and also to defend in her own name any proceedings for depriving her of her rights.(*e*)

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Gifts and grants also, whether express or implied, from husbands to wives, and the converse, are, except when made under the Statute of Uses, generally void at law, though in equity they will, if of a reasonable nature, be frequently enforced in favour of the wife; and also, if the court is fully satisfied that there was no duress or compulsion, in favour of the husband, whether trustees intervene or not.(*ee*) Thus, if a husband convey land at common law, and not under the Statute of Uses, to his wife, she takes nothing at law; but in equity, if a clear intention of benefiting the wife is shown, and there was a valuable consideration, the void conveyance will be treated as an agreement or trust deed, which will be enforced either by compelling a proper settlement of the property, or by making the husband a trustee for the wife. In general, however, the document by which the gift or grant was attempted to be made must be such as would have operated, provided it had been made between strangers.(*f*)

II. *The respective Rights of the Husband and Wife to Property.*

With respect to the property of the wife, the husband by the marriage becomes immediately absolutely entitled to all the money, goods and other *moveable property* of the wife which are in her possession, and also, subject to the wife's equity to a settlement, to her *choses in action*, and all other her personal property which he can and does reduce into possession during the coveture. Such personal property, however, which (as from its being reversionary) he cannot, or which (from delay or otherwise) he or his assigns omit to reduce into possession, will belong to the wife in case she survives; and if she predeceases him, he does not take simply as survivor, but as her administrator, and consequently is *unable to recover them without first taking out letters of administration to her effects.

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The husband also by the marriage becomes absolutely entitled to all *leaseholds* and *chattels real* of his wife in possession, and has also full power to dispose of such leaseholds and chattels real, whether equitable or legal, as are reversionary or expectant and can vest during the coveture; 22 L. J. 99; if, however, he omits to do so, and the coveture determines before they drop into possession, they are subject to the same rule as personal chattles which have not been reduced into possession. Wives can release reversionary charges. 23 L. J. 36.

Though the husband has, as above stated, full power without his wife's concurrence to dispose of her reversionary and expectant interests in leaseholds, neither he nor his wife have any power, during the marriage, of disposing (except subject to the wife's right or survivorship

(*e*) D. C. P. 119, 160.
(*f*) Sto. 1374; 21 L. J. (Eq.) 51.
(*ee*) 21 L. J. 446.

and equity to a settlement) of the wife's *reversionary* or expectant interests in *choses in action*, for the husband has no power of himself; and the wife while *covert* is considered so completely under the husband's influence, as not to have any will of her own and utterly unable to bind herself. And the court of equity will not, as where her interest is immediate, allow her to consent in court to the disposition of her future interests in personalty, nor can such future interests be converted into interests in possession by the conveyance to her or her husband of the prior estate in the property; for the wife being unable, while *covert*, to absolutely accept or refuse a gift, there can be no merger sufficient to unite the two estates.(*g*)

As to the FREEHOLD property of the wife (except such as is separate estate,) whether for life, in tail, or in fee, the husband, immediately on the marriage, becomes seised of it in her right for the joint lives of himself and wife, provided the wife's interest therein continues so long, and he can by his own act, without the concurrence of his wife, dispose of it for such estate; and on the death of his wife, if he survives, he is also entitled by the *curtesy* of England to hold for his life the *lands and tenements of which his wife, or he in her right, was, [*227] during the coveture, solely seised in deed of the legal or equitable (not partly legal and equitable) estate of inheritance (fee simple or fee tail) in possession, provided he had issue by her capable of inheritance the estate, born alive during the marriage; and this right or estate arises even though the property has been limited to the wife's separate estate during her life, nor is it barred by the treason of the wife; but although it arises out of rents, tithes, commons, advowsons and officers of inheritance, there can be none of a mere right, title, condition or personal inheritance. It is generally a life interest in the whole estate, but in lands of gravelkind tenure it is only in a moiety; and in various localities, especially in manors, there are particular customs by which the right, amount, and nature of the curtesy is determined.

The husband's rights in *copyhold* and *customary* lands and tenements of the wife, is similar to that of his right in her freeholds, except so far as the particular custom of each manor alters such rights; and except that he is only entitled to curtesy by the custom of the particular manor, and not generally by the law of the country.

The wife's interest in her husband's property is that of support and sustenance during the coverture; and with respect to *personal* property, in case she survives, a right, under the Statutes of Distribution, to *one-third*, if the husband leaves any issue, or *one-half* if he leaves none, subject to variation by particular customs, as in London and York; and in respect of his *real* property, she is (provided she was married on or before the 1st January, 1834,) frequently entitled, on her husband's death, to *dower*, which is a right *for life* to *one-third* in value of the lands and tenements whereof her husband was at any time during the coverture *solely* seised in law or in deed of the legal estate of inheritance (fee tail, or fee simple) in possession, and of which her issue (if any)

(*g*) 2 Sto. 487; Whittel v. Henning, 17 L. J. (Eq.) 151.

might by possibility have inherited; and if she was married since the 1st January, 1834, she has a like right, modified, however, by the provisions of the statute of the 3 & 4 Will. IV. c. 105, whereby it is pro-
[*228] vided that the *estate of inheritance may be equitable, or partly equitable and partly legal, or one to which the husband had only a right of entry, and the husband is given full power in his lifetime, or by will, of defeating the right to dower, either by a disposition or by a simple declaration. This right of the wife is claimable out of advowsons in gross or appendant, and mines opened and wrought before the husband's death, and in case of women married since the above act, out of an equity of redemption or other equitable inheritance. A divorce *à vinculo matrimonii*, as well as elopement and adultery, is a bar to dower, and so is a jointure and the treason of the husband. In some cases the widow, instead of one-third, is entitled to the *whole* of her husband's lands for life, as in burgage tenure, and in others to *one-half* or *one-fourth*, according to the particular custom of the place.

A right, similar to that of dower, and called *freebench*, is also generally claimable by the widow out of copyhold and customary estates. This right, however, is altogether subject to the custom of the particular manor or place within which the property is situate, and is liable to considerable variations.

The widow is also, by *Magna Charta*, entitled to *quarentine*, which is a right to remain in her husband's capital mansion-house for forty days after his death, during which her dower is to be assigned.

Dower, it seems, is not an estate in the land, but a legal right to receive a portion of its profits, and for such purpose the widow is entitled to an assignment by metes and bounds of her one-third or other proportion of the land.(*gg*) Her claim is much favoured, so that she is frequently considered as having a legal estate in the land, and her right, it seems, will be decreed even against a *bonâ fide* purchaser without notice,(*h*) but neither a tenant in dower or by curtesy can, seemingly, stand seised to a use.(*i*) The courts of law have power to assign dower, but as in nearly all cases the widow necessarily requires a discovery of the title deeds or of the dowable lands, or some other discovery or assist-
[*229] ance, which can only *or best be obtained in this court, a jurisdiction concurrent with the courts of law is exercised, and relief is afforded after the widow's title (if disputed) has been determined by an issue at law, and equity will frequently direct such an issue and retain the bill in the meantime.(*k*)

III. *Wife's Equity to a Settlement.*

Notwithstanding the husband has at law an absolute right to reduce such of his wife's personal property as is reducible into possession, he has in equity no such absolute right, and therefore, if for any reason (as where the legal property is vested in trustees, or other persons who are not liable to be sued for it at law,) it is necessary for the husband to

(*gg*) The Dower Act does not affect copyholds, 24 L. J. 123.
(*h*) Sto. 629, 630. (*i*) Ibid. 970 n. (*k*) Ibid. 624-626.

come into equity to obtain the property, the court, acting on the maxim that he who seeks equity must do equity, and also considering itself as standing *in loco parentis* towards *femes covert*, will refuse to afford him any assistance until he agrees to make a suitable settlement out of the property he is seeking to recover, or of some other property, in favour of his wife and the issue of the marriage, unless the wife and issue are sufficiently provided for by some prior settlement, or the right to a settlement is waived or lost by the misconduct of the wife or otherwise, or the wife, upon being examined in court or under a commission, consents that the whole shall be given up to the husband, or he can be considered as a purchaser of the wife's property by reason of a settlement having been made by him in consideration (either express or implied) of the wife's *whole* fortune.(*l*) This equity to a settlement attaches generally to all personal property of the wife, which cannot be reached without the assistance of equity, and is now considered as extending to sums under 200*l*., although formerly it was deemed not to affect such sums or periodical payments which were less than 10*l*. per annum, and the same were usually ordered to be paid to the husband without the consent of the wife or the requirement of any settlement.(*m*)

*As long as the husband is willing and able to maintain his wife, the court of equity will not (except in special cases)(*n*) give [*230] the wife a settlement out of property in which she has only a *life* interest; but when he ceases to be so, as by becoming bankrupt or insolvent, or by deserting her, a settlement will be decreed out of such property, without the husband has, before any failure in maintaining his wife, assigned it for value, and it is immaterial whether such life interest is in personal or real estate, provided it cannot be reached by the husband or assignees without the intervention of a court of equity.

If the wife's property can be obtained without the intervention of equity, the husband, or his assignee, is generally entitled to obtain and retain it without making any settlement, and therefore any trustee or other person who holds property of the wife, may, before a suit has been instituted (but *not after*) if he chooses, hand it over, or if it is property which cannot be recovered at law, retain it until a proper settlement has been made.(*o*) There are instances, however, in which the courts, on the application of the wife, have prevented the husband from enforcing his legal rights until he has made a suitable settlement; and in cases of *legacies* left to the wife this power is frequently exercised, by the court granting an injunction to stay the husband from recovering them in the ecclesiastical court until he makes a proper settlement; and it seems that whenever the wife as defendant would be entitled to a settlement against her husband or his assigns, she can institute a suit for the purpose of asserting it by filing a bill in the name of her *prochein ami*, or next friend.(*p*) If the husband declines to make a settlement or provision for the wife and children, equity will not, generally, without he miscon-

(*l*) Sto. 1404 et seq.; 2 Sp. 484. (*m*) D. C. P. 96; 20 L. J. (Eq.) 504.
(*n*) See 17 L. J. 99, where the husband had been imprisoned for abduction of the wife; see also 20 L. J. 835.
(*o*) D. C. P. 108. (*p*) Sto. 1414.

ducts himself, take from him the *annual* produce of the wife's property so long as he maintains her, or is willing and able to do so; when, however, he misconducts himself, or deserts her, or by cruelty obliges her to [*231] separate from him, or even if they *voluntarily separate,(q) he will no longer be allowed to receive it; for misconduct is considered a forfeiture, and equity does not treat the income of the wife's property as the husband's absolutely, but only given to him to enable him to perform his duty of supporting her and their children.(r)

This equity of the wife is enforced not only against the husband, but also against his *assigns* (whether in bankruptcy or insolvency, for the payment of debts generally, or even for a valuable consideration,) because, as to all such assigns (except the last,) they, according to the rules, both of law and equity, take the property subject to all the equities and liabilities which affected the bankrupt, insolvent, or general assignor; and with respect to the last, because it is a rule that all assigns are subject to such equities as they have notice of previous to the payment of their purchase or consideration money; and in this case, from the very nature of the transaction, no assign can avoid having notice, for this equity must be deemed well known, and that which shows the husband's title shows also the wife's. The following distinctions, however, must not be lost sight of, namely, that, as *against the husband*, unless he has ill-treated or deserted his wife, or has refused to, or cannot maintain her, as it is presumed, until otherwise proved, that he will, during his life, perform his legal liability of supporting her, the settlement is made only to take effect from his death, and he is in the meantime allowed to receive the annual income and expend it as he thinks proper; and when the property is only a life interest, no settlement is decreed; for the loss which by allowing the husband to assign would be sustained by the wife in case of her surviving may be more than compensated by the benefit, or perhaps relief from difficulties which she and her husband may obtain by a disposal thereof for value; and as *against an assign for value*, if the husband is alive, and at the time of the assignment there had been no failure by the husband in supporting his wife, although part of the *corpus* of the property would be settled, no settlement will be ordered of the annual [*232] income, even if the husband *should then be unable or unwilling to maintain his wife, but whether if the wife were to survive her husband she would be entitled to any part of the annual income against an assign for value is doubtful;(s) but as *against assignees in bankruptcy or insolvency*, or for the benefit of creditors *generally*, as the husband is by the loss of his property rendered for a period at least, if not for ever, incapable of supporting his wife, the court considers, that an immediate provision for the wife is rendered necessary, and consequently obliges such assignees to make a settlement which may at once benefit her.(t)

When the property has passed into the possession of a *bonâ fide* purchaser without notice, the husband, if in a condition to do so, will be compelled to make a settlement out of his own property.

As a general rule, the court does not settle more than one-half of the

(q) 16 L. J. 387.
(r) D. C. P. 101-103.
(s) Ibid. 107-110.
(t) Ibid. 106; Sto. 1421.

wife's property, but under special circumstances it will go beyond this, as where the husband has deserted his wife, or left her destitute, or by some means become unable to render her any support, as by being an insolvent, or an uncertificated bankrupt, but although at one time it was considered that in such cases the *whole* fund would be settled, it seems now that the court will not (except in the case of the marriage of a ward of court without its consent, and of a marriage which is clandestine under the marriage act, or under *very special* circumstances,) enforce a settlement of the *whole* of the wife's property, but only a reasonable proportion, according to the circumstances of the case, and the fact whether there has or not been any previous settlement will be taken into consideration. In a late case two-thirds of a life interest were ordered to be settled on the wife, in consequence of the bankruptcy of the husband.(*u*)

The wife, except she has married clandestinely, or is a ward of court, who has married without its consent, can at any time before a settlement has been executed, even after the *master has actually approved [*233] of one under a decree, by appearing and giving her consent in open court, or under a commission, *waive* her right (which includes that of the children,) and agree that the whole fund shall be absolutely paid over to her husband or his assigns, and although the wife would not by any misconduct lose her vested rights under a valid settlement, or a contract for one made previously to her marriage, yet her equity to a settlement may be lost or suspended by her own misconduct. Thus, if the wife (not being a ward of court married without its consent,) is living in adultery apart from her husband, although equity will not decree the wife's equitable property to be paid over to the husband on his application, as he is at no charge for her maintenance, yet it will not generally, on the wife's own application, direct any settlement *against the husband*, as she has, by such misconduct, rendered herself unworthy of the protection or favour of the court. In a recent case, however, the Master of the Rolls held that adultery did not deprive the wife, on her application of a settlement *against a purchaser*, to whom the fund had been assigned before it fell into possession.(*x*)

Where the wife is a ward of court, married without its consent, a settlement will be directed, even if she consents to waive it, or has misconducted herself, as a punishment to the husband for his contempt of the court in marrying her.(*y*)

Although the court in decreeing a settlement on the wife duly attends to the interests of the *children*, and gives them an interest in the property (provided the wife's estate therein does not cease at her death,) yet it does so only on the assumption that the wife is anxious to provide for her children, and they have no independent equity of their own; for though the husband is under a moral and legal obligation to provide for them till they can maintain themselves, he is not obliged to do so out of any particular property, and their claim to the consideration of the court is capable of being either expressly given up by the wife, or tacitly waived

(*u*) D. C. P. 110-112; 20 L. J. 335.
(*x*) D. C. P. 117; 19 L. J. 494.
(*y*) D. C. P. 117.

[*234] by her death without *having asserted it.(z) Their right, however, attaches on the wife instituting proceedings for a settlement, and therefore if she should die whilst such are pending, without expressly waiving her right, the children are permitted to enforce their claim by a supplemental suit; and though she can waive the settlement altogether as above stated, she cannot waive it as to them, and insist upon it as to herself; and so if the husband has agreed during his wife's life to settle her property, such agreement will enure for the benefit of the children also.(a)

IV. *Separate Estate.*

This is property which the wife has independently of her husband, and, with the exception of the custom of some few localities, altogether a creation of equity, and unknown at common law, and is consequently governed by equitable rules and regulations. It may consist of either real or personal estate, be acquired by deed, will, or any other instrument or means, and may be given to or settled on the wife by an intended husband, or any other person, whether a relation or a stranger, either with or without the intervention of trustees, and either before or after marriage, in contemplation or not of an immediate marriage. Where there is no trustee the husband will in equity be considered as one for the benefit of the wife.(b)

No specific words are required to create separate estate, but any which expressly or impliedly show that the property is intended to be exempted from the control or engagements of the husband, will be held sufficient. Thus a bequest to a married woman "for her own use and at her *own* disposal," has been held to create separate estate, for otherwise the wife would have had no power of disposition over it; so has a gift "for her own *sole* use and benefit," but the words "for her own use," or "her own use and benefit," have been decided to be insufficient, there being in such cases no clear intention that she was to take it free from [*235] the usual marital rights of *the husband. If personal chattels or jewels, or other articles of apparel or ornament, are given to the wife by any one (except the husband,) they will, from their nature, be deemed separate estate; and the interest and accumulations of separate estate are considered as partaking of the same nature as that from which they arose; and so will any savings the wife may make out of her pin-money, or of any allowance which she has for domestic concerns, if made without detriment to the purpose for which it was given, and with the full knowledge and consent of her husband; but if otherwise, then such savings will belong to the husband in his marital rights.(c)

In the city of London a *feme covert* may by the custom carry on trade as a sole trader, and enjoy the profits as her own separate estate.(d) As a general rule, however, a wife is unable to trade on her own account, and when she trades is considered as acting as her husband's agent, so that in general he is entitled to all the profits, and subject to all the

(z) D. C. P. 114.
(b) Sto. 1380.
(d) Rop. H. & W.
(a) Ibid. 114; 1 Mad. 467; Sto. 1417 et seq.
(c) 2 Sto. 1372 et seq.; Wms. Exs. 632; 2 Sp. 502.

liabilities which thus arise: but in equity (as agreements are permitted between married persons) whenever an agreement, either before or after marriage, can be shown, by which the husband allows or promises to allow his wife to trade on her own account, and she accordingly trades, such an agreement will be enforced (even, it seems, where there is no valuable consideration) against the husband, and where it was pre-nuptial, or founded on a valuable consideration, against all persons claiming through the husband, including his creditors, and the intervention of a trustee is not absolutely necessary, although it is advisable to have one in whose name the business should be carried on, and in whom the trade effects should be vested, for then such trustee will, at law, be entitled to such effects and the profits of the trade, and the wife will be treated, not as the agent of her husband, but of such trustee, and her possession as his, and the trustee will, in equity, be considered as holding the property, and receiving the profits for the sole and separate use of the wife, and thus, by the joint operation of law and *equity, the beneficial interest in the property will be secured to the wife.(e) [*236]

Where the trustee is appointed, care should be taken that the business, and all transactions connected with it, are carried on in his, and not in the husband's or wife's name, for if the wife's is used, the business will at *law* (though not in equity) be deemed the husband's, and he will be entitled to its profits, and subject to its liabilities. It is immaterial whether the agreement is express or only implied from the circumstances of the case, so that if the husband allows his wife after marriage to carry on any business on her separate account, or to keep any part of her earnings for her own use, independently of his, or to have any particular thing, as for example, the price of all the butter or cheese which is not consumed at home, all the profits or earnings she thus obtains will be treated as her separate estate;(f) and if a husband should desert his wife, and she by the aid of her friends should carry on a separate trade, the profits thereof will belong to her, and her husband will, in equity, be prevented from depriving her of them.(g) It must here be remarked, that although separate property is generally free from the husband's debts, yet such of it as is obtained from or by the sole permission of the husband (and not from others) by his voluntary act, and without consideration, is notwithstanding the husband has no power over it, liable to his creditors in case of a deficiency of assets.

The wife, with respect to her separate property, is in equity generally considered as a *feme sole*, and accordingly has, unless expressly restrained, full power, even without the consent of her husband, to dispose of the beneficial interest in personal property, or in the income of real property which is given to her separate use. As, however, separate estate is not generally recognized at law, the legal estate in the property can only be disposed of in the ordinary way, or under a power given to the married woman; and in respect to real estate, it seems neither *the legal nor equitable interest (except, perhaps, where the wife has simply the income for life) can be disposed of by the wife otherwise than by deed [*237]

(e) Sto. 1385, 1386. (f) 3 P. W. 337. (g) Sto. 1387.

acknowledged, or by such other means as would be necessary if the property was not separate estate,(*h*) unless a power of disposition is given her; if, however, a power is given her, she may dispose of the estate thereunder, even though there is no trustee interposed for the purpose of protecting the power; and it seems that a power to dispose of the legal estate, although it need not be worded in any particular manner, or even state that it may be exercised during coverture, must nevertheless be more express than a power to dispose of the equitable interest, and cannot, like such last-mentioned power, be so easily implied from the other parts of the document. In cases where such power is given (especially in marriage settlements,) it, as well as the separate interest of the wife, will, if an intention is shown to such effect, be construed as only extending to the marriage in contemplation whereof the settlement was made, and not as extending to a subsequent coverture. It should be remembered that a wife cannot, to the prejudice of the creditors of the husband at the time of the disposition, make any gift or disposition of separate property which the husband has given her without a valuable consideration, for that would be allowing a fraud on the creditors.

When it was found that, by reason of the wife's power of disposition, the benefits accruing from separate estate were greatly lessened, and the husband was thus enabled to influence his wife to dispose of it for his advantage, the court of equity (acting contrary to the general rule of law respecting the alienation of property) allowed separate estate to be fettered by restrictions against alienation and anticipation, so that the wife should have no power of depriving herself of its benefits during her coverture, and thus be effectually protected from marital influence; and now, after much discussion on the subject, it has been for some years clearly decided, that a clause against alienation or anticipation is good [*238] and effectual so long *as the woman remains married, and although such a clause becomes inoperate on her becoming discovert, it will, without the words expressly or impliedly restrict it to one marriage, come again into operation on the woman remarrying, and apply at all times during coverture, either by a first or any future husband; and the cases have also decided that it is not necessary to use any particular words to restrain the disposition, but that a clear intention of such purpose on the face of the instrument is sufficient.

If there is no clause against anticipation, and the wife bestow her separate estate on her husband, equity, in consequence of the influence that husbands possess over their wives, closely examines the transaction, and when called upon to give it effect or sanction, examines the wife in court, or before commissioners appointed for the purpose, and uses other precautions for ascertaining her unbiassed wishes; but where the husband, with the wife's consent, receives the income of her separate estate, equity considers that she voluntarily chooses thus to dispose of it for the benefit of the family, and will not generally compel him to account for more than he has received during the *last year;* and in case of bankruptcy, it seems no claim for arrears can be made, nor apparently with respect to pin-money can any claim of the kind be ever made.(*i*)

(*h*) Sto. 1392; 2 J. & B. 468.

(*i*) Sto. 1395, 1396; D. C. P. 106.

Although at law a woman during coverture cannot make herself or her property liable for any contract, debt, or other charge, not even for necessaries, nor in equity bind her person or her property generally, yet with respect to her separate property she is in equity considered as able to contract, without there is some clause disabling her, so that she can not only sell, but also charge or mortgage such property, and enter into contracts for such purpose as if she was unmarried. Her separate property thereof (except there is a restraint against anticipation) will be liable to all debts and incumbrances which she expressly charges, or which, from the nature thereof, it can fairly be implied she meant to charge thereon; and accordingly, if she gives a bond, a promissory note, or other security, *for the payment of her own or her husband's debts, or even joins him in a security without referring to her separate estate, [*239] it will be considered as charging it, for the bond or other security must have been given by her with the intention of operating, and it can only do so by charging her separate property; such property, however, would not probably be liable for debts of an ordinary character, for which she gives no security or personal undertaking, unless she is living apart from her husband, for the presumption is, that she intended, and in fact she generally does intend, that they should be discharged by her husband; and if the contrary was held, a wife with separate property would frequently be unwilling to attend to her ordinary domestic concerns from the fear that her property would be swept away by the household expenses, and the purposes for which separate estate was intended would be defeated.(*k*) It does not seem clearly decided whether a married woman can contract respecting property not separate estate, but over which she has a general power of appointment.(*l*)

V. *Pin-Money.*

This is of a nature in some respects similar to separate estate. It is a sum payable to the wife under a marriage settlement, or other particular arrangement for her dress and pocket-money, so as to enable her, without the necessity of constant application to her husband, to attire her person in a manner suitable to his rank, and to defray her other ordinary personal expenses. She has not over this the same absolute and sole power as over her separate estate, but she must expend it for the purposes designed, and therefore cannot, without the consent of her husband, either accumulate it or give it away to others; but with his consent she may, for then it will be considered more in the nature of separate estate than mere pin-money; any accumulation, therefore, she makes of this money, without the husband's consent, will belong to him and his representatives.(*m*)

That allowance which husbands frequently make to their *wives for the purpose of defraying the household expenses is [*240] subject to rules similar to the last, and must be in substance applied for the purpose for which it is given, and not accumulated, for it is made by

(*k*) Sto. 1397 et seq.; 2 Sp. 515.
(*l*) 2 Sp. 504, 505; see 23 L. J. 793, and 25 L. J. 529. (*m*) Sto. 1375 a.

the husband simply to avoid a constant application to him respecting the household expenses, and is such a sum as he considers fit for such purpose; all savings, therefore, will belong to the husband, without he consents to the wife's retention of them as separate estate.(*n*)

VI. *Paraphernalia.*

This term is borrowed from the civil law, is of Greek derivation, and means something over and above dower; and our law uses it to signify the personal apparel and ornaments of the wife suitable to her rank and degree. What is suitable, is a question for the court, depending on her and her husband's rank and fortune. Under this head, and not of separate estate, are classed all apparel and ornaments which the husband either before or after marriage has given to his wife, or allowed her to retain for the purpose of adornment or clothing, while such as have been given by third persons since the marriage for the same purpose, would be considered as strict separate estate.

The wife during the coverture has neither at law nor in equity any power of disposition over her *paraphernalia*, for they are hers, not absolutely, but for the purpose of clothing and adorning herself, and thus keeping up the proper rank and dignity of herself and husband. The husband, however, has at law, during his life, full power to dispose of all (except her necessary wearing apparel,) either by way of gift, sale, or otherwise, but not by will, and, with the like exception of necessary apparel, they are liable to the claims of the husband's creditors. If, however, there are sufficient assets, the wife, by surviving, becomes absolutely entitled, and when creditors claim against the widow, the husband's assets will be marshalled in her favour.(*o*)

[*241] ### *VII. *Separation.*

Although some marriages, as between persons within the prohibited degrees, or between persons one or both of whom are idiots or under the proper age, or have previously been married, are considered void *ab initio*, and as no marriage, and will be so declared by the Ecclesiastical Courts, so that the parties can marry again; yet if the marriage was once valid, it never can be dissolved, except by act of parliament, which, in cases of adultery, can be obtained at great expense.(*p*)

Where, from any cause occurring after the marriage, it becomes impossible or improper for the parties to live together, as in the case of intolerable cruelty in the husband, or adultery in either party, the Ecclesiastical Court will decree a divorce *a mensâ et thoro*, by which, although the marriage is not annulled, the parties are separated; and (except when it is for the adultery of the wife, or she has otherwise a sufficient income) *alimony*, which is an allowance out of the husband's property, is given for the wife's support, according to the rank and quality of the parties, for the enforcement whereof, if at any time a difficulty occurs in obtain-

(*n*) Wms. Exs. 640; 19 L. J. (Exch.) 307.
(*o*) Wms. Exs. 643; Sto. 1375-1377.
(*p*) 2 Steph. Black. 260.

ing its due payment by means of the ordinary courts, equity will give the required relief.

Instead, however, of proceeding in the above cases for a divorce, and also in other cases where it would not be granted, but disputes and differences arise among married persons, *mutual separations* are frequently made and agreements entered into for the purpose of carrying out the intentions of the parties.

These agreements, however, cannot relieve the wife from the ordinary disabilities of coverture, and if entered into between the husband and wife alone without the intervention of trustees, they, as well as covenants for separation, or for precluding suits for the restoration of conjugal rights, are utterly void, except when in consideration of the compromise or foregoing of an ecclesiastical suit; but where there are trustees, *and the deed or agreement is for immediate (and not future) separation, and contains a covenant by the husband with [*242] the trustees to pay a sum for the wife's maintenance, and a covenant by the trustees to exonerate and save him from his wife's debts, the same is enforceable as long as the parties remain separate, but for no longer, even as to past separation;(*pp*) and it further seems, that a settlement of property in trust for the wife will be binding on the husband as long as the separation lasts, whether there is or not any covenant of indemnity, and if there is any valuable consideration, as an agreement by the wife to forego her right to a divorce and alimony, or a compromise of a suit, these settlements will also be binding on the husband's creditors and purchasers.

If the separation is for life, or until both agree to live together, an offer by one to live with the other will not put an end to maintenance, but if it is merely temporary or for an uncertain period, an offer, if *bonâ fide*, will have that effect.(*q*)

*CHAPTER II. [*243]

INFANTS.

We will now proceed to consider shortly the rights, powers and liabilities of persons who are designated *infants*. Such persons, according to the law of this country, are all those who have not attained the age of twenty-one years. Until such age our law considers no person as having full legal capacity; although, for certain purposes, person are at an earlier period of life deemed of sufficient legal capacity and made answerable accordingly; thus, though no one under the age of *seven* can be guilty of felony, yet after that age, if *doli capax*, he may be, and at *twelve* a male may take the oath of allegiance, and at *fourteen* marry, and agree or disagree to a previous marriage, and a female can do so at

(*pp*) See 22 L. J. 837. (*q*) 2 B. H. & W. 325-348; Sto. 1428.

twelve; and, by the 12 Car. c. 24, an infant father can appoint guardians for his children.

A person's age is completed on the day preceding the anniversary of his birth, and as the law in this instance, as in most, allows no fraction of a day, he is of age from the very commencement of such preceding day, so that if he was born on the first day of January, 1820, at eleven at night, he would be of age for the purpose of performing any legal act immediately the last day of December, 1840, commenced, though he may not have lived twenty-one years by nearly forty-eight hours.(*a*)

Although, for many purposes, infants are under certain legal incapacities and disabilities, a suit can at any time be maintained in any court either of law or equity for the assertion of their rights and the protection of their property, even though unborn and only conceived, or, as they [*244] are termed in *law, *en ventre sa mere.*(*b*) The proceedings, however, must be carried on by some person as *prochein ami*, or next friend, for the infant, who is answerable for the costs and proper conduct of the suit.

As infants are considered unable to protect themselves, their care and protection devolves on the sovereign as *parens patriæ*, and the doctrine now commonly maintained is, that the general superintendence and protective jurisdiction of the Court of Chancery over the persons and property of infants is a delegation of the rights and duties of the sovereign, which was made to such court at its first establishment, for this jurisdiction does not belong to the Lord Chancellor only, by virtue of his general power as holder of the great seal, or by virtue of any specially delegated jurisdiction, but to the Court of Chancery generally, and so as to be exercisable by the Master of the Rolls, and so that an appeal lies to the Lords, as in other cases in which the court has general jurisdiction.(*c*)

This care of infants is confined to Chancery, since neither the Court of Exchequer nor any other court can assume the right of appointing any other guardian to an infant than one *ad litem*, to conduct the defence of a suit commenced against such a party, which, however, together with that of taking care of the property of infants whenever their interests are judicially brought before them, is incident to every court of justice.

The jurisdiction of the Court of Chancery respecting *infants* relates chiefly to—I. Their *Guardianship*. II. *Maintenance*. III. *Marriage*.

I. *Guardianship.*

If an infant has no property, the court, it appears, will not interfere, except, perhaps, for the purpose of appointing a guardian to consent to a marriage, not from inability, but because it cannot *usefully* exercise its jurisdiction, unless there is some property to apply for the infant's benefit.(*d*) Nor will this court interfere while the father, or a guardian pro- [*245] perly *appointed by him, is living, and there are no *special* reasons for depriving the father or guardian of the care or custody of the child, or for directing or controlling its management or education.

(*a*) 2 Steph. Black. 332.
(*b*) D. C. P. 73.
(*c*) Sto. 1333-1337.
(*d*) 2 Rus. 20.

The *father*, as long as he is living, is considered the natural guardian of his infant children, and is entrusted by our law with their custody and education, on the natural presumption that they will be treated in a proper and fitting manner, and that due care and attention will be paid to their learning, morals, and religion; but when the facts negative this presumption, and a father is found to be in the habit of grossly ill-treating his children, or to be guilty of gross immorality or avowed impiety, or otherwise to behave in a way subversive or injurious to their interests, morals, or religion, the court will either take from him the custody and management of his children, or control him therein according as may appear necessary in each particular case; and though in strictness a guardian cannot be appointed during the father's life, a suitable person will be appointed to act as one. And a father has also been prevented from taking his child, who was a ward of court, out of the country.(*e*)

Besides the father's right during his life, he has, by the 12 Car. II. c. 24, although himself an infant, power by deed, and if of full age, by will,(*f*) to appoint guardians of the person and property of his infant and unmarried children. This guardianship cannot be assigned,(*g*) and if over males, determines at twenty-one; but if over females, at twenty-one or previous marriage, for by the marriage the husband becomes his wife's natural guardian; and although this act does not extend to illegitimate children, the court will, without there is some valid objection, appoint such persons guardians as the father has pointed out.

The *mother* formerly had no legal right to the custody of her children, nor can she appoint a guardian by deed or will;(*h*) *but by an act [*246] of the present reign(*i*) the Court of Chancery, upon petition of the mother, if she has not been adjudged an adulteress, may give her access to her infant children, and if they are under seven, order the father, or such other person who has their custody, to deliver them to her, to remain with her till they attain seven years of age. Independently, however, of this statute, the mother has no right of guardianship, even though the father is dead; but if he has appointed no guardians, and there is no objection, either morally or otherwise, to her, nor other just cause, the court appoints her in preference to any other.

Although *strangers* cannot in strictness deprive the father during his life, or his appointed guardian afterwards, of the guardianship of his children, yet if the father allows a person to adopt his children, or to support and educate them, or consents to his children taking benefits which are given them on condition of such stranger, or his appointee, having their care and management, the court will inquire what will most benefit the children, and if necessary restrain the father or his appointee from exercising the right of guardianship, and allow the children to remain with such person.(*k*)

If the father is dead, and there is no guardian who will or can act, the court will generally upon petition, in a summary way, without a bill being filed, appoint a proper person guardian to the infant, and if there is no

(*e*) D. C. P. 1697; Sto. 1341; 10 Ves. 62.
(*f*) 1 Vict. c. 26.
(*g*) 2 Atk. 14.
(*h*) 2 Swanst. 536.
(*i*) 2 & 3 Vict. c. 54.
(*k*) Gld. 82.

doubt as to the suitableness of the person proposed, the appointment is made at once, without any reference to the Master, but otherwise a reference is first made.

The person appointed guardian is considered an officer of the court, and held responsible to it accordingly; he has the exclusive right to the custody of the infant, and has also power to give receipts for so much of the infant's income as is necessary for its maintenance; and although he probably has some further power, it is difficult to determine how far it extends, but he has no power to make valid leases of the infant's pro-
[*247] perty, consequently it was frequently necessary, both for this *purpose, and also for that of receiving the infant's income, especially when it exceeded the amount allowed for maintenance, to appoint a receiver, for which purpose a bill was formerly required to be filed.(*l*) The act of 1 Will. 4, c. 65, however, rendered this proceeding not so frequently necessary, for by its 17th section the Court of Chancery is empowered, upon the petition, without suit, of any infant entitled to estates in fee or tail, or leasehold property, or of his guardian, to direct the grant of building or other leases without fine or premium, at the best rent that can be obtained, for such term and subject to such stipulations as the court think fit, provided that the mansion-house, park and grounds be not let for a longer period than for the infant's minority; and by the 12th section power of surrendering and renewing leases is given. The court also has lately taken upon itself, in certain cases, where a guardian and maintenance are both required, to appoint a receiver, if necessary, upon petition, in a summary way.(*m*)

A guardian appointed by the father under the before mentioned act of Charles II. has power not only over the person of the infant, but also over all his real and personal estate, and power of giving acquittances for moneys belonging to the infant, and of making valid leases for the term of his guardianship, although not longer; he is nevertheless, as well as all other guardians, subject to the control of the court, and liable to account for what he receives.(*n*)

When it would clearly be for the infant's benefit to change the nature of the property, guardians are allowed to do so, but not otherwise, and for the purpose of preventing guardians, in case of the infant's death under age, from improperly altering, through partiality or otherwise, the rights of the parties, who as heirs or a next of kin would, in case of the infant's decease, be otherwise entitled to the property, equity will consider land which has been purchased by the guardians with the ward's personalty, or with the rents or produce of the realty, *personal estate*,
[*248] and distributable and applicable as such, *and will also consider the proceeds obtained by means of a sale or conversion of the infant's real property, or by the felling of timber thereon, as *real estate*, and descendible as such. Guardians should in general seek the direction of the court before doing acts of the above nature, for then they will be protected from all risk respecting them, while otherwise they may be made answerable for any loss or injury resulting therefrom. The

(*l*) 2 Atk. 315; D. C. P. 1702.
(*m*) 20 L. J. 550.
(*n*) D. C. P. 1702; 13 Ir. Eq. R. 314.

court, on an application being made to it, will inquire as to the propriety or necessity of any such acts, and direct accordingly; and all money or property which may thus be obtained will be ordered to be held in trust for the same persons as would have been entitled to the original property, if it had remained unaltered.(o)

When a guardian has been appointed by the court, the infant is considered a *ward* of court, and although such only are properly designated so, all infants, respecting whose person or property a suit is instituted in Chancery, are treated as wards of court. All acts affecting the person, state, or property of a ward, unless done under the express or implied order or direction of the court, are treated as violations and contempts of its authority, and the persons offending will be arrested for all such contempts, and compelled to submit to such order and punishment, by imprisonment or otherwise, as the court may think proper to inflict.(p)

If a mother, or any other woman, who is appointed guardian, marry, the guardianship determines, and it likewise does so, if one of several guardians appointed by the court die, and in such case a new appointment becomes necessary; but if one of several testamentary guardians die, the survivors still remain guardians, even though there are no words of survivorship.(q)

Whenever sufficient cause can be shown, the Court of Chancery will remove the guardian (whether appointed by its own authority or otherwise,) and will also regulate and direct his conduct as well as afford him assistance, in regard, not only to the custody, but also to the maintenance and proper *instruction and management of the infant, and, [*249] if requisite, will even determine by what means or at what school or other place of instruction the infant shall be educated; and will, provided any injury is likely to result to the person or property of the infant, compel proper security to be given; and also, when there is more than one guardian and they cannot agree among themselves as to the child's management, interpose and assume the guardianship in chief, or appoint other persons either as guardians or as a commitee.(r)

II. *Maintenance.*

With respect to the *maintenance* of infants, it was formerly considered that as parents (or at least fathers) were bound by law, if of ability, to find necessaries for such of their children as were impotent or unable to support themselves either from disease, accident, or otherwise, they must do so, and could not, unless totally incapacitated by illness or otherwise from performing their duty, claim any allowance out of the infant's property for his sustenance or clothing; but now, notwithstanding the Court of Chancery will not allow the infant's property to be touched if the father is alive, and of ability to maintain the child according to its expectations, even where there is a power of a maintenance at the trustee's discretion, as distinguished from a trust for the purpose, it is not necessary to show that the parents are in distressed circumstances, but

(o) Sto. 1357.
(p) Ibid. 1353.
(q) D. C. P. 1700.
(r) Sto. 1339; Gld. 84.

simply that the father is not of ability to maintain the child according to his expectations, without depriving the other children of proper support; and when the father is dead, no inquiry is made whether the mother is or not of sufficient ability.(s) When, therefore, the father is dead, or being alive cannot without detriment to the other members of the family properly support the child, the court will direct a suitable maintenance out of the increase of the infant's property.

The application to the court for maintenance may, where the property [*250] is small and there are no special reasons for the *contrary, be made by a summary application on petition without suit; in other cases, however, the institution or pendency of a suit will be deemed requisite. The 1 Will. IV. c. 65, enables the court, on petition or otherwise as therein mentioned, to direct payment of the dividends of stock standing in the infant's name, to be paid to the guardian, or some other person, for the maintenance, education, or benefit of such infant.(t)

The amount of the maintenance is chiefly guided by the amount of the income of the infant's property, and the position in life which he will have to fill. It is, however, usually confined to the present, not the expected income; but where the property is small, and further money is requisite for the infant's proper maintenance, or it is desired to advance him in life, the court sometimes allows part of the capital to be expended for such purpose. Without, however, the express sanction of the court, or special powers in the settlement, will, or other trust instrument, a trustee or guardian should not (except under very special circumstances) so apply any portion of the capital; and in all cases, except where there are proper trusts or powers enabling the application of money for the infant's maintenance, a proper order of the court for the maintenance of the child should be obtained.(u)

III. *Marriage of Infants.*

The *marriage* of an infant ward, without the consent of the guardians, is called a ravishment of the ward, and is punishable by the statute of West. 2, c. 35, and when the infant is a ward in Chancery (which is when the court has appointed a guardian over it,) the consent of the court must be obtained before any marriage, for if a person marries such a ward without the court's consent, although, he has the guardian's, he, and all others concerned in aiding or abetting the act, will be deemed to have committed a contempt of court, even though ignorant that she was such a ward, and on the petition of the guardian, all the parties will be ordered to attend, and the husband will be committed, and prevent- [*251] ed from seeing his wife, until a settlement, *approved of by the court or master, has been duly executed, after which the husband may apply by petition to be discharged.(v) Even if the ward, on coming of age, is ready to waive her right to a settlement, the court, although it cannot compel the wife to join as to real estate,(x) will

(s) D. C. P. 1707; 19 L. J. (Eq.) 69.
(t) D. C. 1709.
(u) Sto. 1355.
(v) Ibid. 1358-1359.
(x) 16 L. J. (Eq.) 93.

compel the husband to make a proper settlement, and so protect her against the undue influence of the husband, and her own indiscretion in marrying clandestinely; and in no case, whether the infant is a ward of court or not, will she be bound by a settlement which is not fair and reasonable.(*y*)

When a guardian, or committee in the nature of one, is appointed by the court for the purpose of taking care of an infant (who is a female,) the person so appointed is generally required to enter into a recognizance that the infant shall not marry, except with the court's permission, and consequently any marriage by her without such permission, even though the guardian or committee has been guilty of no neglect or connivance, and was really ignorant of any such being intended, will, in strictness occasion a forfeiture of the recognizance. If, however, the party having the care of the infant has been in no way blameable, either on account of negligence or otherwise, the court will generally abstain from enforcing the penalty.(*z*)

If an application is made for the purpose of marrying a ward of court, the court looks anxiously into the circumstances of the intended husband, and generally refers it to the master to ascertain and report whether the match is suitable and advisable, and what settlement ought to be made. If the intended husband is of similar rank and fortune to that of the ward, attention will be paid to the application; but if he proves a mere fortune hunter, having little or no property of his own, the court will not allow the marriage, or, if it does, will prevent him from touching any of her wealth, further than that, in order to secure the lady's happiness, and insure the husband's good conduct, the wife is often empowered to give a portion usually one-fifth of her property, to her husband by will *although in case where, pending a reference, [*252] a ward of court, who had married without consent, died, leaving a child, an application by the husband for part of her fortune was refused with costs, on the ground of his contempt in marrying her without the court's permission.

The court will generally, if possible, stay the marriage until a proper settlement has been executed, and in some cases, as where the intended husband is considered unfit, absolutely refuse to allow it; and if there is reason to expect an improvident one without its sanction, will by injunction interdict not only the marriage, but also all communication between the ward and her suitor, and if the guardian is suspected of any connivance, it will remove the infant from his custody and place her under that of a committee.(*a*)

Where a marriage takes place contrary to the directions of the marriage acts, the Court of Chancery has power in certain cases to settle the wife's property (both present and future) so that the husband shall not directly benefit thereby, to the deprivation of his wife or children. The settlement, however, may be so framed as to give the wife a power of disposal, either to the husband or any other persons, in case there should be no children of the marriage.(*b*)

(*y*) Sto. 1361.
(*z*) Ibid. 1359.
(*a*) Ibid. 1360, 1361.
(*b*) 4 Geo. 4, c. 76, s. 23; 18 L. J. 100.

It may be useful to add, that the Court of Chancery has by a recent enactment of the legislature (13 & 14 Vict. c. 60,) been invested with large powers for the conveyance and transfer of trust estates (both actual and constructive,) which may be vested in *infant trustees or mortgagees.* Powers of a similar kind, though not quite so extensive, had under various acts been previously exercised by the court in such matters.

The protective power of chancery is very frequently afforded to *idiots, lunatics, and others of unsound mind,* and it may perhaps have been expected that the powers of the court over such persons would have been here considered,—as, however, these powers are exercised by the Chancellor under his specially delegated jurisdiction, and not under the gene-
[*253] ral *jurisdiction of the court,(c) it has been thought best not to mix up the investigation of such matters with that of the general jurisdiction of chancery, but simply to refer the reader to the works we possess on the subject, and particularly to Mr. Shelford's, in which the jurisdiction and powers of the court towards persons who are unfortunately labouring under mental deficiencies, are fully and ably treated.

[*254]

*TITLE VI.

AUXILIARY EQUITY.

CHAPTER I.

DISCOVERY.

We will now proceed concisely to investigate those particular powers by which the Court of Chancery can *aid* other courts in the determination of the various questions which are litigated before them. This aid is chiefly afforded for the purpose of obtaining a *discovery* of matters which lie only in the knowledge of the litigant parties, or of documents which are in their possession or power, or for the purpose of *preserving* and *perpetuating evidence* which is in danger of being altogether lost.

First, with respect to Discovery: every bill filed in this court is in truth for this purpose; but that which is usually distinguished by the title, is one for a discovery of facts resting in the knowledge of the defendant, or for the production of documents in his possession or power, and *seeking no relief,* except perhaps a stay of proceedings in some other suit or action until the required information or production is given or permitted.(a)

A bill of the above nature is commonly used in aid of the jurisdiction of some other court, as to enable the plaintiff to prosecute or defend an action at law, or proceeding before the Queen in Council, or any other legal proceeding of a *civil* nature before a tribunal which cannot at all,

(c) Page 7. (a) Mit. 53.

or adequately compel the required discovery. Equity, however, sometimes refuses to render this assistance to inferior courts, and it is undecided whether it will to foreign courts.(*b*)

*At *law*, independently of the recent statute for the amendment of the law of evidence,(*c*) there was and still is frequently [*255] the means of obtaining, in aid of and for the purpose of an action, an inspection of certain documents relating to the matter in dispute; for by the rules of pleading, if either party *claims* or *justifies* under a deed which is mentioned in his pleading,(*cc*) and which ought properly to be in his possession or power, he must generally, unless he can allege, and, on denial, prove, that it has been lost or destroyed, or is in the hands of his opponent, make *profert* of it, and then his adversary, by *craving oyer*, which is demanding to have it read, will be entitled to an inspection, and also, on payment of a reasonable charge, to a full and correct copy.(*d*)

The *common law* judges also have long been in the habit of compelling the inspection of all documents which are *mentioned and relied* upon by *either* side in his *pleading*, and of which profert need not be made; and even though the instrument be *not the* direct *foundation* of the proceeding or defence, but mere matter of evidence to be used at the trial, an inspection can be obtained by either of the litigants, provided the party having the possession or control can in any way be deemed a *trustee thereof* for the applicant; as where one deed has been executed by both, and the applicant has received no counterpart. And so where a party who has executed, or is otherwise interested in, an instrument in his opponent's hands, is desirous of instituting proceedings thereon, but cannot safely declare without an inspection, the same will be compelled.(*e*)

Under the preceding powers, however, no inspection of documents, to which the applicant is neither party nor privy, and in which he has *no legal interest*, is obtainable *at law*, nor it seems before the proceedings have been commenced; but in equity it is not necessary that the proceeding in aid of which the discovery is desired should be commenced, if the discovery sought for is really necessary for that purpose, and as the object of this jurisdiction is to assist and promote the proper and *complete administration of justice in other courts, bills for this [*256] purpose are much favoured.

Until the passing of the before-mentioned act for amending the law of evidence,(*f*) this jurisdiction was the means of affording great assistance to the courts of common law, for neither at the trial, or previously, could they obtain a discovery from the plaintiffs or defendants, nor (except in the cases before alluded to) compel the opposite party to allow inspection of documents in his possession or power. By this statute, however, the *parties* to *any inquiry* or *proceeding* in any court of justice, or before any person authorized by law on consent to receive evidence, and also

(*b*) 9 Sim. 180; Sto. 1495.
(*c*) 14 & 15 Vict. c. 99.
(*cc*) By the Common Law Procedure Act, 1854, profert and oyer are abolished, and certain powers of discovery given at law.
(*d*) Tay. Ev. 1167.
(*e*) Ibid. 1170, 1172.
(*f*) 14 & 15 Vict. c. 99.

the persons for whom the same may be brought or defended, are, since 1st November, 1851, (except in proceedings in consequence of adultery, or actions for breach of promise of marriage, and with certain exceptions in criminal cases) made *competent* and (except as to questions tending to criminate) *compellable* to give evidence on behalf of *either* of the parties to the preceeding, other than according to the opinion of the majority of the judges, a wife *against* the husband or the converse ;(*g*) and the common law courts are empowered, on the application of either of the litigants, at any time after the commencement of proceedings, to compel the opposite party to allow the applicant to *inspect* all documents in the *custody* or under the control of such opposite party relating to the proceeding, and if necessary to take examined copies thereof, or procure them to be stamped whenever a discovery might before this statute have been obtained in equity by such applicant.(*h*)

Neither the discovery obtainable at law by the provisions of this statute, nor under the general powers of the court, will, however, in all cases be sufficient; for there is no power of examining the litigants before the trial or hearing of the matter in dispute, and frequently a discovery is as much or more required for the proper commencement or carrying on [*257] of the *proceedings, as for the determination of the point at issue, and with regard to the inspection of documents, the act gives no power whereby the opposite party can be called upon to state whether any or what documents relating to the matters in question are or not in his possessing or power ;(*i*) in such cases therefore, as well as many others, it will be still necessary to apply to the Court of Chancery for assistance, for it can and will, subject to the exceptions hereafter alluded to as allowable defences against discovery, compel a party to answer an oath respecting things material to the matters in dispute or question, and discover what documents relating thereto he has in his or his agent's possession or control, and also oblige him to allow an inspection thereof.

A discovery also will still be frequently required in aid of proceedings in the court of equity, for not only is the plaintiff in the original suit allowed to obtain a discovery from the defendants thereto, but any of such defendants are also allowed to institute a cross suit for the purpose of obtaining a discovery from the plaintiff in the original one.

When it is necessary to apply to this court for a discovery, it is in a great many cases permitted to proceed also for the relief consequent on such discovery, and thus avoid the necessity of seeking such last in another court, so that the right of discovery becomes frequently a ground for calling on this court to exercise its jurisdiction in giving relief; but to prevent an improper use being made of such ground of jurisdiction, if the sole reason for relief is the discovery which is sought, the bill must be accompanied by an affidavit showing the necessity of the discovery from the defendant (which affidavit is not required in other cases). And further, if no discovery is obtained, the bill must be dismissed and the relief denied, though there may be other evidence sufficient to establish the right to relief.(*k*)

(*g*) Sects. 1-4; see 16 & 17 Vict. c. 83.
(*h*) Sect. 6; 18 L. J. 97, 210.
(*i*) 21 L. J. (Q. B.) 70; 16 Jur. 153.
(*k*) Sto. 691; Mit. 54.

Discovery can be resisted on the following grounds:—

I. That the case made by the bill is *not* one in which a court of equity *assumes* a *jurisdiction* to compel a discovery; *as that the subject-matter is not cognizable in any municipal court, or only in such a court or tribunal as equity declines to assist; as where the proceeding for which the discovery is desired is of a criminal nature, as an indictment or information; or such proceeding is not before a regular tribunal for administering justice, but before judges of the parties' own choice, as arbitrators; or the tribunal itself has full power of obtaining the discovery, as where the facts depend on the testimony of witnesses who can be compelled by the court before which the question is depending to give evidence.(*l*) [*258]

II. That the *value* of the subject-matter is *beneath the dignity* of the court, as under 40*s.* a year or £20 principal, except in cases of charity and quit-rents, in which it seems the smallness is of no consequence.(*m*)

III. That the *plaintiff* has *no interest* in the subject, or none that entitles him to call on the defendant for a discovery; as where the plaintiff is only heir apparent, or he assumes to sue as executor or administrator when he is not, or in some other character which does not belong to him, or the defendant is not answerable to the plaintiff, but to some one else who has a right to call for such discovery.(*n*)

IV. That the *defendant* has *no interest* in the subject so as to entitle the plaintiff to institute a suit against him even for the purpose of discovery, as that he is a *mere witness*, in which case there can be no necessity for asking the assistance of equity. If, however, fraud can be shown, this defence cannot be used; as where an attorney assisted a client in obtaining a fraudulent deed, or an engineer who colluded with the defendant;(*o*) and it seems that the officer of a corporation can be made a party to a bill of discovery against the corporation, because such corporation being an artificial person cannot be compelled to answer on oath, or otherwise than under their common seal.(*p*)

V. Although both plaintiff and defendant may be interested *in the subject, yet that there is *not* such *priority of title* between them as gives the plaintiff a right to the required discovery; for a person is only entitled to a discovery of facts and documents necessary to support his own title, or that under which he claims, and not to pry into that of his adversary; and therefore, the general rule is, that where the defendant's title is not in priority, but inconsistent with the plaintiff's, the defendant is not bound to discover the evidence of his claim.(*q*) [*259]

VI. That the *plaintiff* is not entitled to the discovery by reason of some *personal disability*, as attainder, outlawry, &c.

VII. That the *discovery*, if obtained, *cannot be material*, either for the purpose of supporting the prayer of the bill, or for any other suit actually instituted or capable of being instituted. In general, if it can be supposed, that the discovery may in any way be material to the

(*l*) Mit. 185, 186; Sto. 1495.
(*m*) 1 Sm. C. P. 157; Mit. 110, n.
(*n*) Mit. 187; Sto. 1489, 1490.
(*o*) 18 L. T. 95.
(*p*) Mit. 188, 189; Sto. 1489, 1501.
(*q*) Sto. 1490; Mit. 190.

plaintiff in the support or defence of any suit, the defendant must make the discovery.(*r*)

VIII. That the *situation* of the *defendant* renders it improper for this court to compel a discovery, either because such discovery *may subject* the defendant *to* pains or *penalties* by our (not foreign) law,(*s*) or to some forfeiture or something of the same nature, or may *hazard his title* in a case *where* in conscience *he has* at least *an equal right* with the plaintiff, though such right may not be clothed with a perfect legal title, as if a bill charges anything, which, if confessed, would subject the defendant to a criminal prosecution or to penalties, as an usurious contract, maintenance, champerty, or simony; the plaintiff, however, where he is alone entitled to the penalties, can prevent such a defence by expressly waiving them; and where the penalty arises from the agreement of the defendant, he cannot refuse to discover, nor in cases of fraud or conspiracy, or of a statutory prohibition against resisting a discovery, or an implied or express agreement to such effect.

Where the defendant has in conscience a *right equal* to that of the [*260] plaintiff, as where he is a *bonâ fide* purchaser for valuable *consideration without notice, and has paid his purchase-money, no discovery will be compelled; on the same principle a jointress is entitled to refuse discovery respecting her jointure deed, without the party seeking the discovery is able and willing to confirm it, and does so confirm it.(*t*)

IX. That the *policy of the law exempts* the defendant *from the discovery;* thus, a married woman will not be ordered to disclose facts to charge her husband; nor will a counsel, attorney, solicitor, or arbitrator, be obliged to discover facts derived by means of the confidence which was placed in him as such.(*u*) Communications between solicitors and clients, both in contemplation of, as well as pending litigation, and with reference thereto, are protected; and so are those which were subsequent to the arising of the dispute, if followed by litigation, though not in contemplation of, or in reference to litigation, as well as cases or statements of facts, made in the client's behalf by or for his legal adviser on the subject-matter after litigation commenced, or in contemplation thereof, on the same subject, with other persons for ascertaining the same right.(*x*) This privilege is extended to persons acting as interpreters or agents between the client and legal adviser, but not to mere agents or stewards, nor to physicians or medical or spiritual advisers; and it is more the privilege of the client than that of the legal adviser.(*y*)

Besides that discovery and production of documents which the Court of Chancery enforces in aid of proceedings in its own and other courts, it frequently also compels *production for purposes other than* that of *litigation* in favour of parties who are interested in such documents, and require an inspection to enable them to fully exercise the rights which they may have thereunder. Thus, where there are several persons who are entitled to property under one settlement, and one has possession of it,

(*r*) Mit. 192, 193; Sto. 1489.
(*s*) 20 L. J. (Eq.) 417.
(*t*) Sto. 1054; Mit. 236.
(*u*) Mit. 288.
(*x*) 3 Hare, 122.
(*y*) D. C. P. 526-531.

he will, as a general rule, be compelled to permit the others to inspect it; and so where an estate has been divided on partition, and all the title deeds have been *handed over to one, he must allow the others, whenever necessary, a proper inspection.(z) [*261]

The same rule also generally applies to all cases in which there are *several* joint or other *part owners* of property, and also to cases where there are *various* parties, who have *successive interests* in the same property, for here the party holding the deeds does so both for the benefit of himself and the others, whose titles are thereby evidenced.(a)

A party who applies for inspection of title deeds should always *show some* good reason or *necessity* for his application, as that he requires the inspection for the purpose of enabling him to sell, mortgage, lease, or otherwise dispose of or deal with his rights or interests in the property to which they relate, and it is not clear whether an inspection would otherwise be ordered. The holder of the deeds, however, should not, without some special ground, ever refuse any reasonable and proper inspection to parties who are interested thereunder, or he may find himself compelled by the court, and saddled with the costs of the proceedings; neither agents nor mortgagees, however, are in general justified in allowing an inspection of deeds, without the assent of the principal or mortgagor.(b)

*CHAPTER II. [*262]

PRESERVATION OF EVIDENCE.

THE jurisdiction exercised under this head was apparently adopted from the practice which was used in the courts of civil law of examining witnesses *in perpetuam rei memoriam*, and is now used for the purpose of preserving evidence which for some reason may be lost before its use is required.

There are two kinds of bills for this purpose, namely, bills to take testimony *de bene esse*, and bills to *perpetuate evidence* specifically so called. The *first* kind are used for the preservation of testimony respecting an interest which is vested in the plaintiff, and is the *subject* of some *proceeding* already *instituted*, and depends for its proof on the sole testimony of a single person, or of aged or infirm persons, or on testimony which cannot for some good reason be given in the ordinary way. On a bill of this sort a commission is granted for the purpose of taking the evidence in writing before the usual time, in order that if the witness die, or be not forthcoming at the proper time for examination, such evidence may then (but not otherwise) be used.(aa)

The *other* kind of bill is for the purpose of preserving evidence respecting an interest which is vested in the plaintiff, and cannot be defeated

(z) Sug. V. & P. 467.
(b) Ibid. 468.
(a) Ibid. 469.
(aa) D. C. P. 909; Sto. 1513, 1514.

by the party against whom such evidence is meant to be used, but is likely to be disputed, and *cannot* at present *be made the subject* of judicial *inquiry*.

By the 5 & 6 Vict. c. 69, "any person who would, under the circumstances by him alleged to exist, become entitled to any honor, &c., or any estate or interest in *real or personal property*, the right whereto cannot [*263] at present be tried," is *enabled to file this bill, and where the crown is interested the attorney-general can be made a defendant.

A person who is entitled in remainder, or is in actual possession, is necessarily unable to try his right by any immediate judicial inquiry, and, therefore, he will be allowed to file a bill for the perpetuation of the evidence of his title, for otherwise such evidence may be lost by the death of his witnesses, and his adversary might designedly postpone proceedings with a view to such an occurrence.(*b*)

This relief will be allowed respecting rights of way, commons, or moduses, and also against the heir to establish a will. It seems, however, that persons who may become entitled by the death of a lunatic, or other person of unsound mind, as next of kin, legatees, or otherwise, cannot perpetuate evidence.(*c*)

Evidence taken under these bills will not be permitted to be used if the witnesses are alive and capable of attending, and within the jurisdiction of the court at the proper time for obtaining the evidence in the usual way, but the witnesses' examination must then be retaken in the ordinary form; and where the subject-matter can be brought into immediate investigation, the proceeding for such purpose must at all events be commenced before equity is applied to.(*d*)

[*264] *CONCLUDING REMARKS.

THE intelligent reader who has carefully perused the preceding pages, especially if he has also turned to the numerous references which have been made to the learned commentaries of the late eminent American judge on equity jurisprudence, cannot have failed to observe how immeasurably more extensive are the remedies, and how much more beneficial is the relief, obtainable in equity than at law; and if he is unaware of the practical working of the machinery of the Court of Chancery, he will probably be led to imagine, or at least hope, that a tribunal guided by such high principles of morality and justice, and endowed with such extensive powers as those to which his attention has been called, would truly modify the strict and narrow rules of the common law, and prevent them from working any injustice or hardship—would successfully defeat the machinations and contrivances of the fraudulent, or at least fully redress the wrongs they may have committed—would remedy the defects and injuries which the accidents and mistakes of short-sighted and falli-

(*b*) Sto. 1508. (*c*) Mad. 262, 263. (*d*) Sto. 1508.

ble nature occasion—would unravel the complications and intricacies which negligence and fraud so often produce—would succour and protect the distressed, the weak, and the infirm—and mete out even-handed justice to all—so that the unjust might be confounded—the innocent protected—and all might peaceably enjoy their property, and exercise their rights, without injury to others, or fear of annoyance to themselves; and willingly would he concur in the elegant eulogy which the able author of the Commentaries has so gracefully pronounced in the concluding chapter of his work. How grievous then must be his disappointment when, from his inquiries, or may be, from his own practical experience, *he finds what different results used so frequently to arise, and still sometimes do—how protracted was the relief afforded—what [*265] anxieties and heart-burnings were occasioned—what ruination the heavy expenses of the proceedings often entailed—how dilapidated and decayed became the houses and property respecting which proceedings were pending—how often the youthful suitor grew grey and his children likewise before the suit dragged its weary length to a close—and how often even a successful termination brought ruin instead of relief to the suitor—so that loud were the anathemas which arose against this tribunal; and the people, with a voice which has been heard and most properly responded to, called for its reform.

Those sad and deplorable results, however, arose in no way from any inherent defect in the court's jurisdiction, in the principles by which it was and is governed, or in the purity or ability of its judges, but from such tribunal (which is gradually becoming, and is perhaps even already become, the most efficacious in the realm) being trammelled and hindered in its proper distribution of justice and relief by old and effete systems of practice, which led, by their long and frequently useless forms and procedure, and by the heavy fees which were payable at nearly every step, to most enormous expense and very great hindrance of justice.

Previously to the year 1852, many exceedingly useful alterations and improvements were made in the practice and procedure of the court, and the expense and tediousness of this tribunal were considerably lessened; but it was not until 1852 that any very extensive or complete change was made. In that year, however, the whole practice and procedure of the court was completely altered and materially improved. As early as the month of January, 1852, the commissioners, who at the end of the year 1850 had been appointed by her majesty "to inquire into the powers, practice and system of pleading in the Court of Chancery," made a very careful and elaborate report, recommending a variety of most important *and useful alterations. These recommendations were adopted [*266] by the government of Lord Derby, and soon reduced into bills under the direction of the then Chancellor, Lord St. Leonards, who shortly afterwards introduced them into the house; and during the session of 1852 two acts,(*a*) faithfully carrying out the recommendations of the commissioners, were passed, as well as another very important act(*b*) respecting the fees and expenses of the court.

(*a*) 15 & 16 Vict. c. 80, and c. 86. (*b*) Ibid, c. 87.

By the first(c) intituled "An Act to abolish the Office of Master of the High Court of Chancery, and to make Provision for the more speedy and efficient Despatch of Business in the said Court," provision is made for the abolition of the Masters in Chancery and for the appointment of chief and junior clerks to the Master of the Rolls and the Vice-Chancellors; and powers for performing the duties which the Masters had formerly performed are awarded to the Master of the Rolls and other judges, and their respective officers; and very summary powers are given to the continuing Masters for the purpose of enabling them to wind up and dispose of all cases then pending before them.

The second act,(d) intituled "An Act to amend the Practice and course of the Proceedings in the Court of Chancery," made most important alterations in the practice and proceedings of the court, by which such proceedings have been greatly simplified and their cost materially lessened. By the 1st and other sections the plaintiff's bill or claim is directed to be printed instead of written, and various provisions are made for the service and enforcement of the processes of the court, and the mode of amending the pleadings and bringing before the court supplemental matter, reviving proceedings which by death or otherwise may have abated; and by the 28th and certain subsequent sections a complete change is made in the practice of taking evidence in chancery, and plaintiffs and defendants are respectively enabled *to support or oppose [*267] the case by affidavit or oral evidence. By the 45th and 47th sections, creditors and legatees are given an inexpensive and summary mode of obtaining administration both of personal and real estate; and by the 43d and other sections, the number of necessary parties to various proceedings is reduced; and the 49th section declares that no suit is to be dismissed on the ground of misjoinder or similar objections; and the court is by sect. 48 enabled to make a decree for sale in foreclosure suits; by sects 50 and 51 to make binding declarations of right, without granting consequential relief, and to adjudicate on questions without taking accounts and making inquiries, heretofore essential; by sect. 54 to give special directions respecting accounts; and by sects. 61 and 62 to send cases for the opinion of the courts of common law, and to decide on legal rights; and certain alterations are also made respecting the granting of injunctions and other matters.

And by the other act,(e) intituled "An Act for the Relief of Suitors of the High Court of Chancery," provision is made for remunerating the various officers of the court by means of salaries instead of the late objectionable mode of fees and gratuities; to charge the salaries of the judges on the consolidated fund, and those of certain officers in a manner less onerous to the suitors; to abolish certain offices which had become useless or unimportant in themselves, or in the extent of their duties, transferring such of the duties as continued to other officers; to enable orders to be made for the varying, reducing or abolishing any of the court fees, and cause them to be collected by stamps; and to enable orders and regulations to be made respecting the delivery of copies of pleadings and

(c) 15 & 16 Vict. c. 80. (d) Ibid. c. 86. (e) Ibid. c. 87.

other proceedings, and generally for properly carrying out the intention of the act.

The two previous acts also contained powers enabling the Lord Chancellor and the other judges of the Court of Chancery to make orders for properly and fully carrying into effect the objects and intentions of such acts; and, accordingly, the *Lord Chancellor and other judges did, on the 7th of August, the 23rd of October, 1852, and on the 25th of the same month, make three several sets of most important orders, which have materially aided in improving the practice and procedure of the court, and much lessened the expense; and various fresh orders and regulations have from time to time been since made, which have had a similar beneficial effect, the principal of which are the orders of the 13th January, 1855, applicable to the mode of taking evidence, and those of the 30th January, 1857, which make great improvements respecting the stamps and costs of chancery proceedings, and consolidate the rules respecting them. The acts also of 16 & 17 Vict. c. 22, as to the chancery examiners, c. 78, as to administering oaths, and c. 98, for the further relief of suitors, and c. 100 of 17 & 18 Vict. and c. 134 of 18 & 19 Vict. for the despatch of business in this court, have assisted in improving the court. And by the 16 & 17 Vict. c. 137, intituled "The Charitable Trusts Act, 1853," various powers respecting charities (specially excepting the universities and other bodies) have been given to commissioners, and a staff of officers appointed, and various summary modes of procedure authorized for the adjudication before the Master of the Rolls and Vice-Chancellors of questions relating to charities where their yearly revenue is between 30*l.* and 100*l.*, and before the District Courts of Bankruptcy and the County Courts where such revenue is under 30*l.*; this act has been amended by the 18 & 19 Vict. c. 124, and various orders (particularly those of March 6, 1854) have been made for duly carrying out the provisions of such acts. [*268]

The foregoing measures have been found on the whole to work most beneficially, and have materially remedied the defects of the old system and taken away much of the stigma which rested on the High Court of Chancery; but there are still numerous improvements which all well-wishers of their country must anxiously desire, but which can only be attained by attentively watching the working of the present rules and *regulations of the court, and cautiously making such alterations as from time to time appear necessary. [*269]

That this will be done we have every reason to believe, for both the present Lord Chancellor, Lord Cranworth, as well as his predecessor, Lord St. Leonards, have shown by the measures which they have introduced to the House, or there supported, and the orders that they have made for carrying out such measures, that they are really desirous of remedying such defects as exist in either the law itself or in its administration, and the names of the Master of the Rolls, as well as of two Vice-Chancellors, a common law judge, and three eminent lawyers, are to be found (with two able politicians) among those who recommended the improvements which have been made.

The ex-Lord Chancellor, Lord St. Leonards, besides introducing into

the House and carrying the above measures, did within a very short time after his elevation introduce into the House of Lords a bill for preventing the wishes of testators from being defeated by immaterial irregularities in the execution of their wills, which bill was shortly afterwards passed by the legislature,(*e*) and very properly enables the Court before which the validity of the execution of any will comes in question to determine the same not simply from the particular position of the signature or measure of space which may occur between it and the end of the disposing part of the will, as had been decided in the Ecclesiastical Court,(*f*) but upon a consideration of whether there is sufficient to show that the testator's signature or acknowledgment was made with the real intention of giving effect to the writing as his will.

The year 1852, besides being the era of such important measures of reform in the Court of Chancery, produced also other measures, which are of considerable importance and must here be shortly referred to. The chief were for the enfranchisement of lands and the protection of inventions. By the *first, the 15 & 16 Vict. c. 51, very useful enactments are made for enabling the enfranchisement of copyhold and customary lands, and for providing the mode of carrying into effect such enfranchisement, and such act has been extended and amended by the 16 & 17 Vict. c. 57. By the other (the 15 & 16 Vict. c. 83,) the law respecting the granting of patents for inventions is very usefully amended, and regulations laid down for the obtaining of such patents and protecting their infringement, which have in certain particulars been altered and amended by the acts of 16 Vict. c. 5, and 16 & 17 Vict. c. 115. There was also an act passed (15 Vict. c. 12) as to international copyright, and engravings: and here it may be mentioned that, instead of its being necessary, on the publication of a work, to delivery a copy to the British Museum within twelve months, at stated, at p. 206, the copy is to be delivered within one calendar month, if published within the bills of mortality, three, if beyond and within the kingdom, and twelve, if in any other part of our dominions.

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In 1852, industrial and provident societies were also legalized by the 15 & 16 Vict. c. 31, which was amended by the 17 & 18 Vict. c. 25; and by an act of the 15 & 16 Vict. c. 55, the Trustee Act, 1850, is amended and extended.

In 1853, besides the Succession Duty Act, 16 & 17 Vict. c. 51, and the Charitable Trusts Act, and other measures which have been alluded to, there are no acts which need here be mentioned, except that, by "The Evidence Amendment Act, 1853" (16 & 17 Vict. c. 83,) the husbands and wives of parties to proceedings are made good witnesses, except in criminal cases and adultery, but are not to be compelled to disclose communications made to each other during marriage.

In 1854 an important act (17 & 18 Vict. c. 36) for the registration of bills of sale (except those for the benefit of creditors and on marriage, and otherwise as therein excepted) was passed; and by the 17 & 18

(*e*) 15 Vict. c. 24.
(*f*) 6 Moo. P. C. 402; 2 Rob. 150; and see 16 Jur. 178, *contra*.

Vict. c. 75, certain provisions as to the acknowledgment of married women were made; and by 17 & 18 Vict. c. 104, amended by c. 120, and by 18 & 19 Vict. *c. 91, the laws relating to merchant shipping were amended and consolidated; and the law respecting [*270a] burdens on real property, referred to at p. 142, was altered by the 17 & 18 Vict. c. 113, which has enacted, that persons taking land or other hereditaments charged with money by way of mortgage, by descent after the 31st December, 1854, or by will dated after that day, are (without the late owner has shown a contrary intention) to take the property with its burden, and if there are more than one to take, then proportionably: and here it may be proper to mention that real and personal property appointed by the testator under a general power of appointment would be applicable for the payment of debts next after specific devises and bequests.(g)

By the 17 & 18 Vict. c. 90, passed on the 10th August, 1854, the laws relating to usury and the registration of annuities were abolished, and any rate of interest may now be lawfully taken, but by the 18 Vict. c. 15, s. 12, life annuities and rent charges are not to affect purchasers, mortgagees or creditors until registered in the manner directed by that act, and by the same act no judgments except those that are properly registered are to affect lands as against purchasers, mortgagees and creditors, and certain directions are given as to registration.

In the Common Law Procedure Act, 1854,(h) some very useful provisions are contained respecting arbitration, by which the Court is enabled to stay proceedings where an arbitration has been agreed to, and to appoint arbitrators, on the proper parties failing to do so, and facilities are given for the appointment of arbitrators and umpires, and for the proper carrying out of arbitration and the awards made thereon; and by the 103rd section certain of the sections of the act are declared not only to apply to Courts of Common Law but to every Court of civil judicature, and various facilities are given to the Courts of Common Law for enabling them to obtain discovery *and to restrain by writs, in the nature [*270b] of injunctions or prohibitions, certain acts which were theretofore only restrainable in equity.

Besides the act of 18 Vict. c. 15, before mentioned, some few acts of importance were in the year 1855, also passed, some of which may here be alluded to, as the 18 & 19 Vict. c. 43, by which infants are enabled, with the consent of the Court of Chancery, to make binding settlements of their real and personal properties,(i) and the 18 & 19 Vict. c. 63, whereby the laws respecting friendly societies are amended and very usefully consolidated.

During the year 1856 a very important act, the 19 & 20 Vict. c. 47, respecting joint-stock companies, was passed, whereby companies, others than those for banking and insurance, are allowed to be formed either with or without limited liability (as had been previously partially allowed by the 18 & 19 Vict. c. 132,) and various enactments are made respecting the formation and incorporation of such companies, their manage-

(g) 23 L. J. 886.
(h) 17 & 18 Vict. c. 125.
(i) Re Dalton, 25 L. J. 571.

ment and administration, and for enabling them, if unsuccessful, to be dissolved and wound up.

And by another act, called "The Mercantile Law Amendment Act, 1856,"(*k*) protection is given to persons who are entitled to goods which are taken in execution (sect. 1;) Courts of Common Law are empowered to order the specific delivery of goods (s. 2;) the consideration for a guarantee need not appear by writing (sect. 3;) and a guarantee to or for a firm is, except in certain cases, made to cease on a change in the firm (sect. 4;) and the surety who discharges the liability is given a right to the securities held by the creditor (s. 5;) certain provisions are made as to bills of exchange (sects. 6 and 7;) actions on merchants' accounts are restrained to six years (sect. 9;) and certain provisions are made respecting absence beyond the seas and imprisonment (sects. 10, 11, 12;) certain acknowledgments by agents are made sufficient (s. 13;)

[*270*c*] *and part payment by one jointly liable is not to prevent the others from having the benefit of the Statutes of Limitation.

And by the last act of the session, the 19 & 20 Vict. c. 120, which came into operation on the 1st day of November, 1856, the Court of Chancery is enabled to authorize, under certain conditions and subject to certain exceptions, leases and sales of settled estates, and tenants for life of such estates, and other persons therein named, are enabled, without an application to the Court, to make leases for twenty-one years, subject as therein mentioned,(*l*) and on the 15th November, 1856, orders were made for regulating the proceedings. This act will be found of essential service in enabling holders of settled estates to carry out plans and improvemants, which they were formerly deterred from by the great expense which the necessity of a private act occasioned.

In consequence of the dissolution of parliament which has recently occurred, no enactments of any importance relating to the Court of Chancery are likely to be passed this year; and the only measure before the House which need be here alluded to is one for making certain breaches of trust punishable and amenable in the Criminal Courts, but which cannot affect or alter the rules of equity respecting trustees.

(*k*) 19 & 20 Vict. c. 97. (*l*) Sects. 32-34.

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